



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

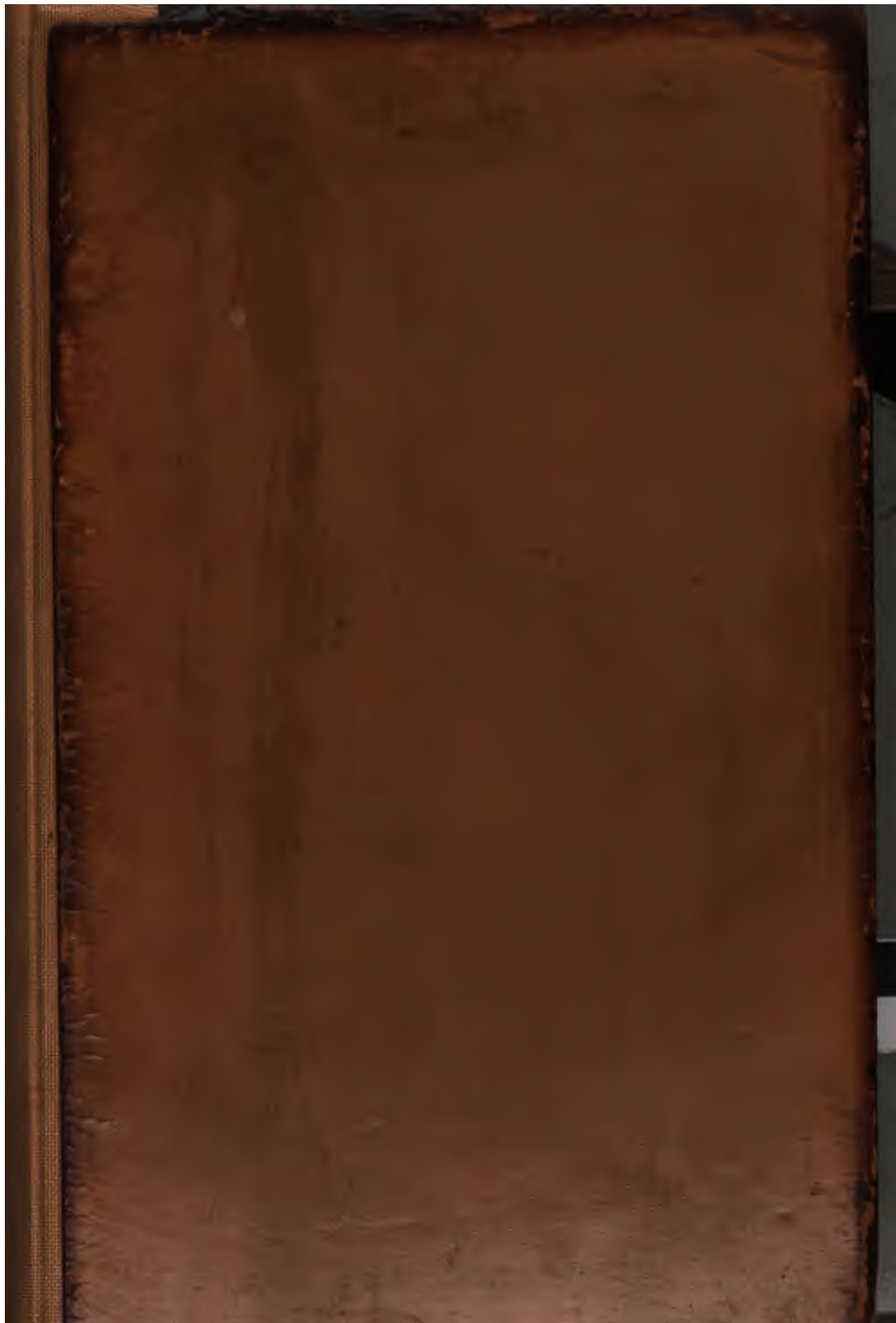
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



L.L.

CW U.K
Scott 100
C50

FOR INFORMATION

REPORTS OF CASES
DECIDED IN
THE HOUSE OF LORDS,
UPON
APPEAL FROM SCOTLAND,
FROM 1753 TO 1813.

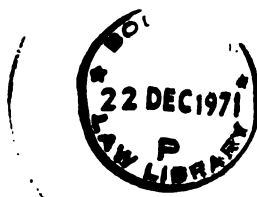
V O L. V.

BY
THOMAS S. PATON,
ADVOCATE.

BEING THE CONTINUATION OF THE
REPORTS OF MESSRS. CRAIGIE AND STEWART.

EDINBURGH :
T. & T. CLARK, 38. GEORGE STREET.
LONDON: BENNING & CO.

MDCCCLV.



EDINBURGH:
J. THOMSON, PRINTER,
MILNE SQUARE.

LORDS-CHANCELLOR.

THE RIGHT HON. LORD ELDON, from 1801 to 1806.

THE RIGHT HON. THOMAS LORD ERSKINE, from 1806 to 1807.

THE RIGHT HON. EARL OF ELDON, from 1807 to 1827.

LORDS-CHIEF JUSTICE OF ENGLAND.

LORD ELLENBOROUGH, from 1802 to 1818.

SIR CHARLES ABBOT—LORD TENTERDEN, from 1818.

ATTORNEYS-GENERAL.

SIR ARTHUR PIGOTT,	-	-	-	-	1804 to March 1807.
SIR VICARY GIBBS,	-	-	-	-	1807 to May 1812.
SIR THOMAS PLUMER	-	-	-	-	1812 to April 1813.

SOLICITORS-GENERAL.

SIR SAMUEL ROMILLY,	-	-	-	-	14th Feb. 1806 to 1807.
SIR THOMAS PLUMER,	-	-	-	-	April 1807 to 1812.
SIR WILLIAM GARROW	-	-	-	-	1812 to May 1813.

ROBERT DALLAS, Esq, elevated same year (1813) to the Common Pleas.

LORDS-PRESIDENT OF THE COURT OF SESSION.

RIGHT HON. SIR ILAY CAMPBELL, Bart.,	-	-	-	-	1789 to 1808.
RIGHT HON. ROBERT BLAIR,	-	-	-	-	1808 to Oct. 1811.
RIGHT HON. CHARLES HOPE,	-	-	-	-	1811 to 1841.

LORDS-JUSTICE CLERK.

RIGHT HON. CHARLES HOPE,	-	-	-	-	-	1804 to 1811.
RIGHT HON. DAVID BOYLE,	-	-	-	-	-	1811 to 1841.

LORDS OF SESSION.

LORD NEWTON, (CHARLES HAY, Esq.),	-	-	-	-	-	1806 to 1811.
LORD SUCCOTH, (SIR ARCHIBALD CAMPBELL, Bart.),	-	-	-	-	-	1809 to 1825.
LORD SHEWALTON, (DAVID BOYLE, Esq.),	-	-	-	-	-	Feb. 1811 to Oct. 1811.
LORD CRAIGIE, (ROBERT CRAIGIE, Esq.),	-	-	-	-	-	1811 to 1834.
LORD BALGRAY, (DAVID WILLIAMSON, Esq.),	-	-	-	-	-	15th Nov. 1811 to 1837.
LORD GILLIES, (ADAM GILLIES, Esq.),	-	-	-	-	-	1811 to 1842.
LORD PITMILLY, (DAVID MONYPENNY, Esq.),	-	-	-	-	-	1813 to 1830.

LORDS ADVOCATE-GENERAL.

RIGHT HON. SIR JAMES MONTGOMERY, Bart.,	-	-	-	-	-	1804 to 1806.
RIGHT HON. HENRY ERSKINE,	-	-	-	-	-	1806 to 1807.
RIGHT HON. ARCHIBALD COLQUHOUN,	-	-	-	-	-	1807 to 1816.

GENERAL INDEX OF NAMES

TO

VOLUME V.

<i>Appellants.</i>	<i>Respondents.</i>	
Allan, William	De Voz and Mandatory	Page 110
Arnot, Dr. and Others, Professors of St. Andrews College	Dr. Hill and Others, Professors of St. Andrews College	256
Bank of Scotland	James Watson	655
Balderstone, David, and his Factor <i>loco tutoris</i>	Wm. Hamilton, Esq.	234
Balfour (now J. Kirkpatrick)	Margaret Sime	525
Blane, Andrew, W.S., Trustee for Sir Andrew Cathcart	Archibald, Earl of Cassillis	1
Blane, A., W.S., Trustee for Sir Andrew Cathcart, Bart.	Archibald, Earl of Cassillis	307
Borrowstounness, Minister of	Town of Borrowstounness	144
Boswall, Thomas,	James Morrison	649
Bruce, Robert,	Wm. Ogilvie	706
Cadell, William, Esq. of Banton	Wm. Black and Others, his Brothers and Sisters	567
Cadell and Davies	James Robertson	493
Campbell, James, and Others	M'Nair and Others	48
Carron Company	John Ogilvie, Esq.	61
College of St. Andrews	College of St. Andrews	256 et 266
Crauford, Mrs. or Howison, afterwards Moodie	Thomas Coutts, Esq.	73
Craigdallie, James, and Others	Rev. J. Aikman and Others	719
Douglas, Samuel James	John Smith Wilson,	303
Duff, Hugh Robert	Magistrates and Town-Council of Inverness	762
Durham, Mrs. Janet	Mrs. Sarah Durham and Husband	482
Elgin, Earl of, &c. (Heritors of Dunfermline)	Rev. Allan M'Lean, (Minister of Dunfermline)	593
Fleming, Hon. Charles	George Harley Drummond	537
Fleming, Archibald	John M'Nair, Esq.	632

<i>Appellants.</i>	<i>Respondents.</i>
Forbes, Wm. Esq. of Callender, and Another	{ Sir William Honyman, Bart. and Others (Earl of Galloway's Trustees) Page 226
Fordyce, Arthur Dingwall	{ Sir John Gordon of Park, and Alexander Moir 165
Frank, William, Daniel, Arthur	{ James and William Franks 278
Frazer, John	{ John Spalding, Esq., and Others 642
Galloway, Earl of	{ Alexander M'Hutcheon, Charles Selkirk and Others 169
Glassell, John	{ Earl of Wemyss 104
Gordon, Mrs. or Stewart and Husband	{ Agnes Tough 286
Graham, William Cunninghame	{ Countess of Glencairn and her Attorney 134
Haig, James	Wm. Hannay, &c. 703
Haig, James	John Napier 703
Hall, Thomas	H. Ross, Esq. 729
Hamilton, Duke of	Rev. John Scott 224
Hamilton, Duke of	Rev. John Scott 745
Henderson, Robert	Robt. Ramsay and Francis Maxwell 155
Henderson and Sellar	Allan and Others 736
Hill, Robert, W.S.	Andrew Ramsay, Esq. of Whitehill 299
Howie, John	James Merry 101
Johnstone, Peter, and Others	W. and E. Stotts 119
Johnstone, Sir William	Middleton, Noel, Templar, and Co. 653
Ker, General and Richard Hotchkis, W.S.	{ Sir Jas. Norcliffe Innes, and Jas. Horne, W.S., his Commissioner 320
Ker, John Bellenden, Henry Gawler, and John Seton Karr	{ Sir Jas. Norcliffe Innes and General Walter Ker 361
Kers, Lady Essex and Lady Mary	{ John Wauchope, W.S., Rev. Chas. Baillie and Others, (Reduction on the head of Incapacity) 547
Ker, Lady Essex	{ Sir James Norcliffe Innes, Bart. and General Ker, (her Claim to Estates) 579
Ker, Lady Essex	{ Sir James Norcliffe Innes, Bart., and General Ker, (Peerage Cause) 601
Ker, John Bellenden	{ Sir James Norcliffe Innes Ker, Bart. (Feu Cause) 609
Ker, John Bellenden	{ Duke of Roxburghe, &c. (Feu Cause) 768
Kirkpatrick, John, (formerly Balfour)	{ Margaret Sime 525
Macadam, Alexander	Elizabeth Walker, &c. 673
Macadam, Alexander	Elizabeth Walker and Others 675
Macdonald, Lieut.-Colonel Alexander	Captain George Elder 542
Magistrates of Kirkcudbright	Archibald Affleck 254
Martin, John, and Others	Alexander M'Nab and Others 125
Masterton, Alexander, and Others	David Meiklejohn and Others 298
Menzies, Stewart, of Culdares	{ Mrs. Elizabeth Mackenzie Beresford or Menzies, and Husband 522
Millie, David	{ Elizabeth Millie or Whyte, and Husband 160
Morton, Earl of	James Stewart, Esq. 720
Minister of Borrowstounness	Town of Borrowstounness 144
M'Nair, John	Archibald Fleming, Esq. 639
Playfair, Dr. and Others, Professors of the College of St. Andrews	{ Rev. Mr. Macdonald and Others, Professors of said College 266
Prestonkirk Case	{ - - - - - 210

GENERAL INDEX OF NAMES.

vii

<i>Appellants.</i>	<i>Respondents.</i>
Queensberry's Executors, Duke of	Earl of Wemyss and March Page 758
Rae, James and Others	Margaret Newall and Husband 127
Ranken, George	Hugh Goodlet Campbell 573
Redfearn, Francis, Esq.	William Sommervail and Others 707
Rennie, Rev. Robert	{ James Tod and Others, Inhabitants
	{ of Borrowstounness 144
Richan, Wm. of Rapness	{ Thomas Trail and Others (Stewart's
	{ Trustees) 239
Rochied, James, of Inverleith	Sir Alexander Kinloch, Bart. 35
Robinson, Wm., &c.	Wm. Clark, &c. 698
Rose, Wm.	Earl of Fife 115
Scott, Colonel	Thomas Gillies and Others 750
Sharpe, Robert, &c.	Messrs. Bury, Lyod, and Co., &c. 704
Shedden, Wm., and Hugh Crauford, his	{ Dr. Robert Patrick 194
<i>Factor loco Tutoris</i>	{ John Yelton and Others 139
Smith, Jas., and Jas. Tod and Others	{ Alexander Allan and Another 229
Smith, James and Others	{ Major Macneil of Ardnacross 244
Smith, Rev. Dr., and Rev. Dr. Robertson	{ Robert Bogle 248
Smith, Jas. and Others	{ John Allan, &c. 669
Smyth, Christopher	{ Messrs. Auchie, Ure, and Co. 291
Spence, John	{ Magistrates of Aberdeen 313
Still, Alexander, and Others	
Thomson, Lieut. Thomas	{ Elizabeth, Margaret, and Catherine
	{ Walls, Children of Margt. Thom-
	{ son, and her Husband Walls 654
Thomson, David, W.S. and Others	{ Alexander Kincaid Tate and Others 176
Watt, John	John Morris 697
Wauchope, John, W.S., and Others	{ Lady Essex and Lady Mary Ker,
	{ (Reduction on Death-Bed) 559
Webster, Thomas	Thomas Christie 705
Wemyss, Earl of	{ Rev. Daniel M ^c Queen and John Con-
	{ nell, Esq. 210
Wemyss, Earl of	Alexander Carre 219
Whitson, James, and Another	Sir James Ramsay, &c. 664
Whyte, William and Ann Sharp	James Stewart 60
Wilkie, Alexander	Messrs. Johnstone, Bannatyne, & Co. 191
Wilson, John Pettigrew, and Others	John Alexander and Others 182

CASES

DECIDED IN

THE HOUSE OF LORDS,

UPON APPEAL FROM

THE COURTS OF SCOTLAND.

[Fac. Coll. Vol. xiii. p. 123; et Mor. p. 14,447.]

ANDREW BLANE, W.S., Trustee for Sir Andrew } *Appellant*;
Cathcart, Bart., }
ARCHIBALD, EARL OF CASSILLIS, and Others, *Respondents*.
House of Lords, 24th May 1805.

GENERAL SERVICE—POWER TO ALTER DESTINATION IN ENTAIL.—In a reduction and declarator of the titles to the Culzean estates, held, 1. that Earl David's general service (1776), *tanquam legitimus et propinquior hæres masculus et lineæ* of his only brother german, Earl Thomas, necessarily established in him the character of heir of provision under a previous settlement 1748, and vested in him the personal right of the subjects thereby conveyed to him. The Court, by two previous interlocutors, had found to the contrary; and, in the House of Lords, this part of the judgment was remitted to be reviewed; and *quoad ultra* affirmed as to the subjects contained in the charter 1774. 2. Held that the deed 1748 was alterable, and that Earl Thomas had validly done so.

SIR JOHN KENNEDY of Culzean, Baronet, died in the year 1742, leaving three sons, John, Thomas, and David, and three daughters, Elizabeth, Ann and Clementina.

The eldest son, Sir John, died in 1744, without issue, and was then succeeded by his next younger brother, Sir Thomas, (who, upon the death of John, Earl of Cassillis, in 1759, without issue, also succeeded to the honours and estate of Cassillis), and, upon his death in 1775, without issue, he was succeeded by his immediate younger brother David, both to the title and estates of Culzean, and to the earldom and estate of Cassillis. And, upon David's death,

1805.

BLANE
v.
EARL OF
CASSILLIS, &c.

1805. without issue, in Dec. 1792, the Culzean estates, as the
 appellant contended, fell to devolve on Elizabeth, the eldest
 daughter of Sir John Kennedy the first, who was married to
 Sir John Cathcart; and Sir Andrew Cathcart, as the only
 surviving male issue of that marriage, and the heir of line
 of the said Sir John Kennedy the first and second, as also of
 Thomas and David, Earls of Cassillis.

BLANE
 v.
 EARL OF
 CASSILLIS, &c.

Ann, the second daughter, married John Blair of Dunskey, by whom she had several sons, now all deceased without issue. She had likewise two daughters, Jane, married to Sir James Hunter Blair, and Clementina, married to Mr. John Bell. Clementina Kennedy, the youngest of Sir John Kennedy's three daughters, died without issue. But the earldom and estates of Cassillis, as will be seen from the deeds afterwards to be described, went to a remote cousin, (the respondent), in virtue of a restriction to heirs male.

The appellant is trustee appointed by Sir Andrew Cathcart for the purpose of raising the present action of reduction, challenging the respondent's title to succeed to the Culzean estates, founded on several objections stated to the titles, and particularly to Earl David's general service, and his power to alter the previous destination of succession; and therefore the appellant maintained that Sir Andrew Cathcart, besides being Sir John Kennedy's heir of line, was entitled to succeed to these estates as heir of provision under a deed of entail 1748. Thus the whole question hinged on the previous state of the titles, a description of which is necessary.

Jan. 28, 1743. Sir John Kennedy the *second* was served nearest and lawful heir male and of line to his father, Sir John Kennedy the first, and also nearest and lawful heir of provision to him, under a contract of marriage dated the 15th of March 1706, executed by his parents. Feudal titles were completed to the barony of Greenan, and some other parts of the estate; but he died without making up feudal titles to Culzean and some other lands; but he had, however, a personal right to the whole estate that belonged to the family in 1706, in virtue of his service of heir of provision under this contract.

April 12, 1743. Sir John the second then executed a procuratory of resignation, whereby he bound and obliged himself, his heirs and successors, to make due and lawful resignation of the lands, baronies, and other heritable subjects therein mentioned, being the barony of Culzean, and the whole other lands and estate, in favour of himself and the heirs male of

his body, whom failing, to the heirs female of his body ;
whom failing, " to the heirs male procreated of the marriage
" between Sir John Cathcart, Bart., and the deceased Dame
" Elizabeth Kennedy his spouse, my eldest sister german."
No resignation was taken thereon during the lifetime of Sir
John, who died within a year thereafter.

1805.

BLANE

v.

EARL OF

CASSILLIS, &c.
April 12, 1743.

Sir Thomas Kennedy, on succeeding to his brother Sir John,
in 1744, exped a general service, as nearest and lawful heir
of line, and heir male, and also as nearest and lawful heir
of provision, in terms of the contract of marriage 1706, and
of the above procuratory in 1743, to his deceased brother.
And, at same time, (Jan. 1747), he exped a service as heir
of line, heir male, and of provision to his father.

Entail
Jan. 1748.

Sir Thomas, in Jan. 1748, then executed a disposition and
deed of entail to himself and the heirs male of his body,
whom failing, " to Mr. David Kennedy, my only brother
" german, and the heirs male of his body ; whom failing, to
" David Kennedy, advocate, my uncle, and the heirs male
" of his body ; whom failing, to John Kennedy of Kilthenzie,
" advocate, and the heirs male of his body ; *whom all fail-*
" *ing, to my own nearest heirs whatsoever,* (the eldest heir
" female and heir descendants so oft as the succession de-
" volves upon females or their descendants, excluding still
" all others from being heirs portioners, and succeeding al-
" ways without division throughout the whole course of
" succession, so as that the right of primogeniture shall take
" place among the female heirs in like manner as the same
" does among male heirs), all and sundry the lands, baro-
" nies, and other heritages hereafter described, viz. all and
" whole the lands and barony of Greenan, &c. (here the
" whole lands then belonging to him are specially enumerat-
" ed), " and all and singular tithes, both parsonage and
" vicarage, of all and sundry the lands before specified, and
" all other lands and heritages of whatever kind, or wher-
" ever lying, which I shall hereafter acquire or succeed to."
This deed was registered in the Books of Council and
Session five days after it was executed.

There was a difference in the line of succession between
this deed and the procuratory of 1743. In the procuratory
Sir Andrew Cathcart is called expressly after the failure of
heirs male ; but he contended that even under this deed
1748, he was called under the substitution of the " heirs
whatsoever," of the maker of that deed.

In the year 1748 Sir Thomas made up titles to the lands Charter 1748.
which stood in the family upon personal titles, viz. to the

1803.
 BLANE
 v.
 EARL OF
 CASSILLIS, &c.

Charter 23
 Feb. 1757.

lands of Balchaystens, Balkennay, Macgowanstown, Duni-muck, and Mill Drumgirlock, by charter partly from the crown and partly from the prince, proceeding upon procuratories of resignation in the title deeds of his predecessors, and the service of his brother Sir John, as heir to his father, Sir John's procuratory 12th April 1743, his own service as heir to his brother, and his own disposition of 2d Jan. 1748, as giving right to the original procuratory, and upon this charter infestment was taken, whereby the heirs of the deed 1748 became heirs of investiture. These lands had stood in the family upon personal titles for some generations. He completed feudal titles to the rest of the estate in 1757, in the following manner: His brother Sir John had made up titles, and been infest in all the other lands holding of the king or prince, besides those already mentioned; and Sir Thomas, for completing his titles to the lands in which his brother had been so infest, viz. the barony of Greenan, the £7 land, &c. the barony of Turnberry, and part of £10 land of Thomastown, exped a charter of all these lands, proceeding upon his brother's procuratory of 1743, his own service, as heir to his brother, and his own disposition of 12th Jan. 1748, upon which he was infest; and in the same charter and infestment were included the remainder of the lands of Thomastown, the kirk lands of Kirkoswald, and the lands of Balvaird, being three purchases made by himself, whereby the heirs of the deed 1748 became the heirs of investiture in all these lands.

The barony of Culzean and other lands being held of the family of Cassillis, and which remained *in hæreditate jacente* of his father, Sir John the first, and there being no room for completing titles to the lands, in the way of resignation upon a procuratory, Sir Thomas obtained a precept of *clare constat* from the then Earl of Cassillis for infesting him as heir of his father in that barony, the lands of Coiff, the ten pound land of Drumgirlock and Drumbane, the annual rent payable out of the barony of Girvanhead, and certain tene-
 Feb. 14, 1757. ments in Maybole, and got himself infest thereon.

Previous to this, Sir Thomas had made various purchases, and also subsequently had made further considerable purchases both before and after succeeding to the estate of Cassillis, viz. the teinds of various lands conveyed by Crawford of Ardmillan in 1758—the lands of Pennyglen, *Smithstones*, St Murray, *Over Culzean*, and Cargilston, in April 1762; *Ballochniel* in Dec. 1763; Enoch in December 1764; *Daljarbrie* and others in August 1768; and Bardarocks in

February 1771. The dispositions to these were taken in general terms to him and his heirs and assignees whomsoever. He was infeft base in these. There were some changes of the title ; in particular, in 1765 and 1774, with a view, as it was alleged, to political influence, Sir Thomas Kennedy, then Earl of Cassillis, created a great number of wadset and liferent votes upon his estate ; in doing which, it was alleged the titles underwent some alterations, but that the settlement of 2d Jan. 1748 remained unaltered and unrevoked by Earl Thomas until the day of his death. In particular, it was alleged that so far from having the most distant thought of ever making his paternal estate of Culzean, and his own acquisitions, devolve with the estate of Cassillis upon remote heirs male, that, only a year before his death, he took measures for withdrawing the superiorities of such parts of the estate of Culzean as were held of the family of Cassillis out of the entail of the Cassillis estate.

1803.

BLANE
v
EARL OF
CASSILLIS, &c.
1765 & 1774.

The mode in which these changes took place was, after separating the property from the superiority, by means of feu-rights granted to his brother, Mr. David Kennedy, he resigned the lands into the hands of the crown, and obtained a new charter of this date, (23d Feb. 1774), comprehending the superiority of the barony of Culzean, and various other valuable portions of his estates (Greenan excepted), in favour of himself, and his heirs and assignees whatsoever.

Charter 1774.

After granting the above feu right, Earl Thomas conveyed the charter 1774 to certain persons in liferent, who were infeft, and thus became invested with the liferent superiority ; but, with respect to the fee, which was taken to Earl Thomas and his heirs and assignees whatsoever, the procuratory remained unexecuted until after his death.

Upon the death of Thomas, Earl of Cassillis in 1775, David Earl of Cassillis, who was next heir, both of the entailed estate of Cassillis, and of the estate of Culzean and others, belonging to Earl Thomas, made up titles to a great part, though not to the whole of these lands ; but he never made up any title as *heir of provision* in terms of the settlement of 1748. The method adopted by him in completing his title as to most of the lands was this ; having expedited a general service in April 1776, as nearest and lawful heir of *line and heir male* to his brother, which he thought carried the personal right in the charter 1774, and thereupon took infeftment upon this and other unexecuted charters obtained by Earl Thomas in the course of political operations above men-

Service 1776.

1805.

 BLANE
 v.
 EARL OF
 CASSILLIS, &c.

tioned, and being thus vested, or imagining himself to be vested, with a right of superiority, he granted a precept of *clare constat* for infesting himself in the property, when that happened to be disjoined from the superiority, but without always attending to the real state and situation of the base rights, of which there were often more than one subordinate to another, under the same right of superiority.

Sir Andrew Cathcart, Earl Thomas, and David's nephew, lived upon the best terms, and they having no children, he, as the nearest and natural heir to the estate of Culzean, was naturally led to expect to succeed to it. But, upon Earl David's death in 1792, it appeared that, by certain settlements, (deeds of entail 1783 and 1790), he had called after the heirs male of his own body, and failing whom, all the prior substitutes of the former entail, the *heir male whatsoever* of the said John, Earl of Cassillis, making the succession to continue to descend to his other *heirs male whatsoever*, who were entitled also to inherit the titles of honour and dignities of the family, and this, not only in regard to the lands and earldom, but also in regard to all his other lands and estate therein mentioned, declaring that they should continue with the same heirs male. By the entail 1790, he had excluded Sir Andrew, and all his own near relations, from the succession; and, particularly, by that deed, the whole estate of Culzean, and all the acquisitions of Earl Thomas, and the purchases of Earl David himself, with an exception presently to be mentioned, were conveyed to the respondent, Captain Archibald Kennedy of the navy, late of New York, America, a cousin three or four times removed, but who happened to be the *heir male* to the Cassillis estates and honours.

Action of reduction and declarator having been raised by the appellant, it was maintained, that as Earl David never made up a title, as heir of provision, in terms of the deed 1748, he remained a mere apparent heir of the lands in question, and, by the well known rule in law, had no power gratuitously to alter the destination to the prejudice of the heirs in that deed. It was therefore made a material question in the case, how far, by the destination in the charter 1774, the destination in the former deed 1748 was altered and affected. Sir Andrew Cathcart claimed to succeed under the deed 1748, which, he contended, must regulate the succession to the Culzean estates; and, after leading an adjudication against the estate upon a trust bond granted to the appellant, his constituent, to try the question, he

raised the present reduction, to have those deeds set aside, 1st, On the ground that they flowed *a non habente potestatem*, in so far as respects the land rights in question. That as Earl David had never made up a title as heir of provision, in terms of the settlement 1748, he remained a mere apparent heir as to that disposition, and so had no more than a mere personal right, and therefore could not alter the order of succession, to the prejudice of the heirs of the standing destination. 2d, That although Earl Thomas had, in the year 1774, in order to extend his political influence, passed a new charter containing the superiority of many of the lands in question, which charter was conceived in favour of himself, and his heirs and assignees, and which charter was not intended to alter the settlement of the estate which had been made by the deed 1748, and could not have that effect. 3d, That the term "heirs and assignees" being flexible, must be understood in the charter 1774 as of the heirs of the destination in the deed 1748, and therefore that the service of Earl David, as heir male and of line to Earl Thomas, could not connect him with the lands in the charter 1774, as it was necessary for that purpose that he should have been served heir of provision, in terms of the deed 1748, by which the succession was regulated. 4th, That even supposing "heirs whatsoever," in the charter 1774, to signify heirs of line; and that Earl David had, by his service as heir of line, vested in him the right to that charter, and had been duly infeft thereon, still it would not enable him to alter the succession to the lands and superiorities contained in that charter, as they remained subject to the governing settlement of 1748, under which he had made up no titles; and, separately, that the settlement of 1748 contained an implied prohibition against altering the order of succession, so that Earl David, even if he had completed titles, could not make an alteration of the succession. In answer, it was maintained that Earl David was both heir of line and heir of provision, and that the general service *tanquam legitimus et propinquior hæres masculus et lineæ* of his brother was in effect a general service as heir of provision, in terms of the destination 1748, and did import and imply such service, and carry all and every right in that character; and that by this service, therefore, the disposition 1748 was vested in Earl David. 2d, That there was no prohibition against altering the order of succession; and the general service did sufficiently connect him with the charter of 1774 in favour of

1845.

BLANE

v.

EARL OF

CASSILLIS, &c.

1805. heirs and assignees, so as to carry all the lands therein mentioned.

BLANK
v.
EARL OF
CASSILLIS, &c.
May 18, 1797.

The case came first before the Lord Justice Clerk, (M^cQueen) as Ordinary, who pronounced this interlocutor : —“ Having considered the mutual memorials for the parties, finds, that Earl David’s service, as heir male and of line “ to his brother Earl Thomas, necessarily established him “ to be heir under the settlement 1748. But, *Secundo et* “ *separatim*, finds that the settlement 1748 was alterable “ by Earl Thomas at pleasure, and in respect that by the “ disposition 1774, executed by Earl Thomas, and charter “ following thereupon, a *considerable* part of the lands in “ dispute stood devised to Earl Thomas, his heirs and as- “ signees : Finds, that Earl David’s said service did effect- “ ually carry the right of *superiority* of these lands, as “ established by the foresaid charter, and that the precept “ of *clare*, granted by Earl David in his own favour, with “ the infeftment thereupon, did effectually carry the pro- “ perty : Finds, that it is of no importance, in this question, “ whether the property was consolidated with the superi- “ ority or not in Earl David’s person. For, although in a “ question of succession *ab intestato*, these lands, without “ consolidation, would be considered as two separate estates, “ descendible to different heirs, if so devised, yet, as both “ property and superiority were effectually vested in Earl “ David’s person, so any deed of conveyance of these lands, “ executed by him, would carry every right and title he “ had in the lands, whether of property or superiority ; “ and, therefore, upon the whole, repels the reasons of “ reduction as to the whole of the lands contained in “ the disposition 1774; repels also the reasons of reduc- “ tion as to the whole of the other lands and tenements “ in dispute, except as to the tenements in Maybole, “ the lands of Portmark and Polmeadow, the teinds con- “ tained in the conveyance by Mr. Crauford of Ardmillan, “ the lands of Enoch and Daljarbrie, as to which, desires “ to hear parties farther ; and, with the foresaid exceptions, “ assoilzies the defenders, and decerns.” Two representa- tions were given in to the Lord Ordinary, but his Lordship adhered. Another representation having been given, went before Lord Armadale as Ordinary, (from Lord Justice Clerk’s indisposition,) and his Lordship adhered ; and hav- ing heard parties as to the lands excepted, he found, in re- gard to Portmark and Polmeadow, that Earl Thomas was infeft in these, on dispositions granted by the persons from

whom he acquired them; but as these were not comprehended in Earl Thomas' disposition of 1774, or charter following thereon, Earl *David's* general service was insufficient to vest in him the right and title to these lands, and reasons of reduction sustained as to these. But his Lordship, on representation, altered this interlocutor (13th Jan. 1799), and found "that Earl Thomas' disposition in 1748, "in favour of his brother David, conveyed not only the "lands therein specially enumerated, but also all the other "lands which the said Earl Thomas should thereafter acquire; and that Earl David's general service in 1776 was "sufficient to establish his right as heir under the disposition 1748, and therefore adheres *in toto* to the interlocutors pronounced by the late Justice Clerk, of date 13th May and 29th June 1797, and assoilzies the defender "from the whole conclusions of the libel."

1805.

BLANE
v.
EARL OF
CASSILLIS, &c.

On a reclaiming petition to the whole Lords, the Lords pronounced this interlocutor:—"Find, that David, late Earl of Cassillis, by his general service, *tanquam legiti-* Jan. 16, 1800.
mus et propinquior hæres masculus et lineæ of his brother, Earl Thomas, carried right to the unexecuted precept in the charter 1774, and did thereby vest in him a sufficient personal right to the lands therein contained, and also to every other lands belonging to his brother, which stood upon personal titles of the same kind, devised to heirs and assignees whomsoever. Find, that as Earl David was heir to his brother, as well by the special destination contained in the deed of settlement executed by Earl Thomas in 1748, and the charters following thereupon, as by the other titles and investitures in the person of Earl Thomas, it is unnecessary to determine the question, whether the special destination was altered or not by charter 1774, the general service being in all events sufficient, in point of form, to connect him with the lands contained in the charter, or in any similar titles, and so far adhere to the interlocutors reclaimed against. But ordain the parties to give in a memorial upon the other points of the cause, and particularly upon the question of consolidation respecting the lands of Macgowanston and others, and upon the question, whether the general service was sufficient to connect Earl David, as heir of provision under the settlement 1748, with the different parcels of land "which were acquired by Earl Thomas."

The appellant reclaimed, and upon advising together with the memorials which had been ordered as to the con-

1805. solidation; and whether the general service was sufficient to connect Earl David with the deed 1748, so as to enable him to take up those lands to which he had no other title but under that deed. The Court adhered "to their interlocutor reclaimed against, and refuse the desire of the petition; and farther, find the general service of Earl David sufficient to carry the subjects not contained in the charter 1774: Repel the reasons of reduction, assoilzie the defendant from the whole conclusions of the libel, and decern."

BLANK
v.
EARL OF
CASSILLIS, &c.
Jan. 15, 1801.

This interlocutor made the cause final before the Court of Session, with regard to the whole lands contained in the charter 1774, and upon similar titles. But, upon other points of the cause, the appellant reclaimed, contending that the general service of Earl David, as nearest lawful heir male and of line to his brother, was not a service as heir of provision under the settlement 1748, sufficient to vest in him the right descending to such heirs of provision, or to carry the subject not contained in the charter 1774.

May 26, 1801. The Lords pronounced this interlocutor:—"Find, that the general service of David, Earl of Cassillis, *tantum legitimus et propinquior hæres masculus et lineæ* of his brother Earl Thomas, was not a service as heir of provision under the settlement 1748, and, consequently, is not sufficient to carry the subjects in question, which are not contained in the charter 1774, sustain the reasons of reduction as to these subjects, and remit to the Lord Ordinary to proceed accordingly." The respondent reclaimed

July 7, 1801. against this interlocutor, whereupon the Court "Find that the meaning of the Court, in pronouncing the interlocutor 26th May last, was, to find, that Earl David's general service was not a service, as heir of provision, to connect him with the settlement in 1748, or with any similar deed of provision or settlement; and, consequently, was not sufficient to carry the subjects which were specially provided by any such deed, and which were not contained in the charter 1774, or in any other title deed or charter of a similar nature: Finds that the lands of Enoch and Little Enoch, the lands of Portmark and Polmeadow, and tenements of Maybole, and the teinds conveyed by Crawford of Ardmillan, were of this description, and were not carried to Earl David by the said general service; but that all other lands in question were so carried: And, with this explanation, allow an additional petition upon the general question of law respecting the import or effect of

“ the general service expedite by David Earl of Cassillis 17th April 1776.” On this petition the Lords pronounced this interlocutor: “ Find that Earl David’s general service *tanquam legitimus propinquior et hæres masculus* et lineæ of his only brother german Earl Thomas, necessarily established him to be the heir under the settlement 1748, and vested in him the personal right of the subjects thereby conveyed to him; and therefore that he has now right to the lands of Enoch and Little Enoch, the lands of Portmark, Polmeadow, the tenements in Maybole, and the teinds conveyed by Crauford of Ardmillan; repel the reasons of reduction as to these subjects, assoilzie him from the conclusions of the summons as to these, as well as to those contained in the charter 1774, and decern.”

1805.
BLANE
v.
EARL OF
CASSILLIS, &c.
Nov. 16, 1802.

Opinion of the Judges.

Advising 15th January 1801.

LORD PRESIDENT CAMPBELL said,—“ I am of opinion that the interlocutor is clearly right. Earl David had two ways of making up his titles to the lands, contained both in the charter 1774 and deed 1748; and as he was unlimited proprietor, no third party could object to the mode which he chose. And there is clearly nothing in the last argument contained in the close of the petition, because, if Earl David did, in any shape, make up a title sufficient to connect him with the estate, he was under no limitation as to altering.

“ The simple question here is, Whether Earl David has made up a habile title to enable him to alter or to burden? not what rule of succession would have obtained, suppose he had made no alteration? A deed of settlement of succession is one thing, and a charter or a title is another.”

LORD JUSTICE CLERK.—“ I am also for adhering.”

LORD HERMAND.—“ The question reserved in the interlocutor ought to be determined first. I am of opinion that no alteration was intended.”

LORD ARMADALE.—“ I am for adhering as to the point in the petition and answers. As to the second point, how far the service as ‘ *legitimus et propinquior hæres masculus et lineæ*,’ is a sufficient service as heir of provision, I think it is enough if it is necessarily implied.”

LORD HERMAND.—“ The service cannot be of provision without saying so in express terms. And I think something more than mere intention is necessary.”

LORD MEADOWBANK.—“ The term, ‘ heirs male’ itself, means heirs of provision. Earl David was called by these terms; and declaration to that purpose might have been sufficient to complete title.”

1805. LORD BANNATYNE.—“ The service clearly pointed him out as heir of provision.”

BLANE v. EARL OF CASSILLIS, &c. LORD CRAIG.—“ In my opinion the service is sufficiently connected with the charter 1774, but not with the deed 1748, as heir of provision.”

LORD PRESIDENT CAMPBELL.—“ The first point is consolidation. The case of Drummelier was decided on general principles, and not upon the specialities. There is too little said here upon that decision. But, in the present case, it is thought the plea of prescription is good.

“ The second point is the effect of a general service to connect with the deed 1748, so as to take up the lands in that deed. This is clearly not a service as heir of provision, and therefore insufficient. The proof of the fact by declarator is not sufficient.

“ The third or last point is irregularly introduced, and is untenable in law.

“ As to the service, the Lord Ordinary, by the first part of his interlocutor, does not mean to lay down a general proposition, but decides only *in this case*, taking in aid the charter 1774. The greater includes the less. Ergo, a special service includes a general one, and a son serving himself *tanquam legitimus et propinquior hæres* to a father, includes the heir male of the father. This alone is the principle, in the case of Haldane, &c. *vide* the case of Menzies. In the case of Haldane, suppose the case had not been settled on Patrick at all, but on a third person, whom failing, to John Haldane, eldest lawful son of Patrick Haldane, or to the heirs of tailzie, then John had been served nearest and lawful heir to his father, this would not have been a service as heir of provision to the estate. A special service includes a general service *ejusdem generis*, but not of a different kind.

“ The quotation from Mr. Erskine on this subject is correct. The object of a special service is, to connect with a particular estate, and, the titles being produced, an erroneous description may be more easily excused, upon the principle of the decision in *Bell v. Carruthers*, Rem. June 21, 1749. and the same holds in precepts of *clare*.
Dec. No. 107.

“ But a general service as heir of line, heir male, &c., means to vest a certain character of heirship, and, of course, a title to carry any subjects or rights destined in that manner, without being confined to any special subject.

“ A general service, as heir of provision, ought always to have reference to a particular subject, and so far is of the nature of a special service, being truly what is called a general special service, being special *quoad* the subject, but general so far as it relates to a right not clothed with infestment.

Maitland of Pittrichie, Aug. 12, 1753. “ There are many instances of general services as heir of provision, without reference to a particular subject, but it is believed, that in all of these, the deed of provision or settlement, which was the ground of the service, was produced to the jury, in order to instruct
Mor. 14,431, et House of Lords, ante vol. i. p. 570.

the claim. and was so mentioned in the proceedings. An heir of provision is not a general character, such as heir of line, &c., but a special and limited one, founded upon deed; and in no instance was this ever found to be implied from or included in the general character of heir of line or heir male. Even the case of *Livingstone v. Menzies*, as reported very inaccurately by Forbes, goes no farther than to find, that an eldest son, being served heir of line to his father, was of course also heir male to his father, and entitled to a provision, destined by contract of marriage to heirs male, which was in some degree similar to the case of *Dalhousie and Hawley*.

1805.
BLANE
v.
EARL OF
CASSILLIS, &c.
Jan. 12, 1706.
Forbes' Decisions.
Dalhousie v.
Lord & Lady
Hawley, Nov.
13, 1712, Forbes' Dec.

"*Legitimus propinquior hæres* is of pliable signification, and where a son is served in that character to his father, he necessarily must be both heir of line and heir male, at least he cannot be the former without being the latter. This was the principle of the decision in the case of *Haldane*; but if he had been served *legitimus propinquior hæres lineæ*, this would not have implied a service as heir male, and, at any rate, it never could have been carried a step farther, to imply heir of provision to a subject devised or destined not under any general description of that kind, but under a special description, or to the claimant as a special substitute.

"A general service, as nearest heir at law to the predecessor, may be necessary for the very purpose of challenging a deed of settlement granted by that same predecessor, by which the succession is provided to the claimant himself as the first heir, but under burdens and conditions which he does not think it proper for him to acquiesce in. To challenge such a deed, a general service is necessary, Dict. vol. ii. p. 472. Nor was the contrary found in the case of *Gordon v. Ogilvie*, observed in the Dict., for that case is not correctly abridged. Now it would be very extraordinary to maintain that a service as *legitimus et propinquior hæres masculus et lineæ* expedie for the very purpose of enabling the heir to challenge his predecessor's deed, was tantamount to a service as heir of provision under that deed, which of course would be a homologation of the deed, and bar him *eo ipso* from insisting in the challenge.

"A service *tanquam legitimus et propinquior hæres masculus et lineæ* does not even include a service as heir of conquest, which is another general character, and, in the present case, had there been an heir of conquest existing, the service expedie by Earl David would not have connected him with such of the lands in the charter 1774 as had been conquest by his brother. Far less does it include a service as heir of provision, because it does not directly, nor indirectly, refer to any provision, or to any special destination whatever, nor to any right so devised.

"The decisions have gone far enough in the cases of *Haldane*, &c., which were merely contested as departing from the strict original principle of the feudal law; but, to carry them farther would produce endless confusion and uncertainty in our land rights, and therefore ought strenuously to be resisted.

1805. " Sir Thomas might have had a son who predeceased him, but to whom he had disposed the estate in his own life ; in that case a service as heir of provision to that son would have been necessary. A general service as heir of line, &c., requires nothing but proof of propinquity ; but a service as heir of provision does not prove propinquity, but connection with the successor through some deed, in order to which the deed, or some evidence of it, must be produced to the jury. A service *tanquam legitimus et propinquior hæres masculus et lineæ* takes all rights descendible in that line, and to these general characters or descriptions of heirship, and nothing more, i. e. writs, bonds, adjudications, teinds.

" Heir male is, in one sense, *hæres factus*, and an heir of provision, but the law itself has given him a feudal character of a general nature ; and a man may choose to be served heir to his ancestor in that character, independent of any subject which he is to take by it. It is a mistake to say that he took up the succession under the service. He was heir apparent of all the investitures, and by all the deeds, and in that character (which was the only one he had to the lands in question) he possessed them. It is not fair to the memory of M'Queen. the late Justice Clerk to suppose, that a hasty opinion, given by him in the Outer House, was his deliberate opinion, contrary to what he gave in the case of Colville.

" The great object of a service is to vest a right, and to carry a succession from the dead to the living. It is not merely for proof of a fact, and it is no matter what evidence you see on the face of it ; for example, every service of an eldest son to his father, in whatever character, must always prove him to be the nearest heir of his father.

Advising 16th Nov. 1802.

LORD PRESIDENT CAMPBELL said :—

" That a general service *tanquam legitimus et propinquior hæres masculus et lineæ*, is not equivalent to a service as heir of provision, in order to take up a personal right to lands destined to particular heirs, and can vest no right in a substitute called by name, is a proposition so clear, that the contrary argument would probably not have been attempted, had it not been thought to receive some countenance from the decisions in the cases of Dalhousie and Haldane.

" The general doctrine of the law is well explained in the answers, and illustrated by many authorities.

" *Mortuus sasil vivum* never was a principle in the law of Scotland, either in heritage or in moveable succession ; and, supposing it had been so at an early period, it is and must be admitted, that certain forms are now necessary to transfer property of any kind from the dead to the living, and that succession does not operate *ipso jure*. It is of no consequence when the form of a general service,

as now used, was introduced, or whether the same was done by some other form at the period alluded to in p. 15, of the petition, for still some form of cognition is even there admitted to have been necessary. But, in connecting the heir with the ancestor in a right of lands, there could not originally be any such thing as obtaining an entry from the superior upon a mere personal conveyance or personal right of any kind flowing from the ancestor, who was not at liberty to alien without the superior's consent, and whose procuratory or precept for that purpose fell to the ground by his death, like any other mandate. The superior was not obliged to receive any successor in the fee, except the heir in the investiture. The predecessor's infestment of course was produced, and the heir entitled to succeed by that investiture was alone entitled to claim a renewal of the fee in his person, which accordingly was done, either by special service, or precept of *clare constat*, or by cognition *mori burgi*, (*more burgagio* ?) and sasine following thereon.

" The inference drawn from the passage of Erskine, p. 15, viz. that a personal right to the lands passed without any service at all, is quite erroneous. What it means is, that the original brieve of inquest did not apply to the case, because it was only the heir of investiture, and not the heir in personal rights, that could demand an entry, till the law was gradually altered in this particular ; first, in the case of apprisings and adjudications, 1469 c. 37 ; 1672 c. 19. Then in the case of purchasers at judicial sales, by 1681, c. 17 ; 1690, c. 20 ; by the act 1685 concerning entails, and by the ward act 20 Geo. II., and further, by the act 1693, c. 35, allowing procuratories and precepts to be executed after the deaths of the granter or the grantee.

" So soon as personal rights of land or other heritages came to be known and practised, some form of cognition to connect the heir with the ancestor in such rights, became of course necessary, as the rule was general that no *ipso jure* transmission could take place, with certain exceptions, none of which apply to the present case, and accordingly it is admitted, that for at least two centuries and more, the established form has been, by general service, under the brieve of inquest, to take up such incomplete rights, which either do not, in their nature, require infestment, or have never been carried that length, which brieve is just the same with that in a special service, except that it contains fewer heads, because it is not necessary to answer those heads which suppose the predecessor to have been infest.

" It is necessary, however, to attend to the different kinds of general service, and to the different objects which are in view in expediting such a service, from which we will see, that the term general, when applied to services, has two distinct significations. In the first place, a general service, in the most proper sense, is a service which means to vest a general character of heirship in the grantee, without reference to any particular subject. 2d. It may be a service referring to, and for the purpose of connecting with, a particu-

1805.

 BLANE
 v.
 EARL OF
 CASSILLIS, &c.

1805.

BLANE
v.
EARL OF
CASSILLIS, &c.

lar subject or subjects, in which the predecessor did not die infest. This is what Lord Stair calls a service in general, and what some lawyers call a *general special service*, analogous to the general special charge which may be given by a creditor to the heir of his debtor, to enter in a particular subject in which his predecessor died uninfest.

“Of the first kind, viz. services merely general, are the service *tanquam legitimus et propinquior heres lineæ*; the service *tanquam legitimus et propinquior hæres masculus*; the service *tanquam propinquior et legitimus hæres conquestus*. All these are distinctly marked and known, and can admit of no ambiguity. It is unnecessary to refer to any particular subject. The object of the service is to vest one or other of these general characters in the heir, which will entitle him to take up without any further ceremony or form, every *personal right*, which, either by law or by deed, is descendible to that particular character of heirship so described in the retour.

Vide ante.

“A general service *tanquam legitimus hæres provisionis* is of more limited nature, in so far as the law does not know any such heir, unless arising out of the provision of some particular deed. He is not an heir at law, but a *hæres factus*, and therefore a service as heir of provision ought regularly to refer to some particular deed or subject, and, for the most part, does so, as the jury cannot well answer to the brieve without some evidence being laid before them, by production of a deed, and reference to a subject thereby conveyed, and therefore it was a disputed point, in the case of Maitland of Pitrichie, whether a retour of service, bearing the claimant to be nearest and lawful heir of tailzie to his predecessor, in general terms, without saying to what estate or to what deed, was a good service, although it appeared from the proceedings, that, for instructing their claim, she had produced the tailzie itself. But the service was sustained both here and in the House of Lords; and it is believed there have been instances of services, as heirs of provision, without production of any deed, or at least without any such thing appearing on the face of the proceedings; but all the inference to be drawn from this is, that juries have sometimes proceeded, in such cases, upon very slender evidence, which seems to be of little importance one way or another, the object of such a service being merely to vest in the claimant the general character of heir of provision, and, consequently, a title to take up the succession to any subject which may happen to be provided to him by the ancestor. If there be none such, the service will do neither good nor harm.

“It was observed by one of the judges, that an heir male is always, by the law of Scotland, an *hæres factus*, as much as an heir of provision, and, therefore, that we have no occasion to distinguish his case from that of any other heir of provision, because nothing passes to him by law except by some particular deed or destination.

“Supposing this observation to be right, it does not occur what inference arises from it which can bear upon the present question.

If it be meant that a service as heir male is tantamount to a service as heir of provision, this is evidently a mistake ; a person may have in him the technical character of heir male to such a person, without any provision at all. Heir male is a designation which birth alone bestows, and cannot be conferred by any deed, so that, *qua* such, he is clearly a *hæres natus*, not a *hæres factus*. This distinction is clearly laid down by Balfour. In Balfour's time it was understood to be a destination to the heir male, in contradistinction to the heir of line ; and, therefore, he speaks of two kinds of brieves only, one for the heir of line and another for the heir of tailzie, under which last the claimant (says he) may be served not only as heir of tailzie, but as heir male ; but he does not admit of a brieve for serving as heir male alone, for this reason, that all heirs male are not heirs of tailzie, but heirs of tailzie (says he) are heirs male. Although, therefore, in Balfour's time, a service as heir of tailzie, meaning a *special* service, might virtually denote heir male, because there were no other heirs of tailzie, or rather, as he says, a brieve of inquest, in the character of heir of tailzie, might authorize a service as heir male ; the reverse did not hold, for the reason assigned by him.

"There is another kind of service of a general description, under which an heir may be served, and which requires to be attended to. He may take out a brieve to be served *tanquam legitimus propinquior hæres* to his predecessor, without saying whether *linea*, *masculus*, *provisionis*, &c. This lays the foundation for argument upon the import of such a general phrase, in the same way as often happens with respect to heirs whatsoever, or heirs or assignees whatsoever, in a deed. The most proper signification of any such phrase is, that it denotes the heir at law, *i. e.* the heir *ab intestato* whom the law itself calls to the succession, independent of any act or deed. But the term heirs whatsoever has, in many instances, been found pliable *secundum subjectam materiam*, so as to denote other heirs, and sometimes even nearest of kin. In the same way, there is room for argument, that *legitimus et propinquior hæres*, although, in its most proper signification, denotes the heir at law, *i. e.* heir of line, yet it may, in particular circumstances, be construed to denote, or to include other heirs.

"Suppose a middle brother dies, and both his older and younger brother are served in the same precise terms, *tanquam legitimus et propinquior hæres*, without adding either of line or conquest, it is thought that both services would be good, the one to carry the ancient heritage, and the other the conquest.

"A special service of this kind *tanquam legitimus et propinquior hæres* to the deceased in certain lands, must always be construed as applying to the investiture. A precept of *clare constat* the same. A general special service the same ; for the very object in view is to connect the claimant with a particular subject, and with the line or character of heirship described in the deed referred to.

1805.

BLANE
v.
EARL OF
CASSILLIS, &c.

1805. " This will account for some of the decisions relied on by the petitioner, particularly the case of the Earl of Dalhousie, which was a special service. See *Ratio Decidendi*, Dict. vol. ii. p. 365. The late case of Calderwood Durham was of the same kind. See also President Dalrymple, 29th November 1716. Action, where it was disputed, whether a special service would be held as a service in the character of heir of line ?

BLANE
v.
EARL OF
CASSILLIS, &c.

" The case of Haldane was attended with more difficulty, as being a mere general service, not referring to any subject or to any deed ; but it was determined upon a similar principle, namely, that *legitimus et propinquior hæres* were of pliable signification, denoting in a general service every heir at law, and that an eldest son serving to his father, being *ex necessitate juris*, both heir of line and heir male to his father, these general words *legitimus et propinquior hæres* necessarily included both. A son cannot be heir of line to his father without being also heir male, and therefore *legitimus et propinquior hæres* to his father, cannot be restricted so as to denote heir of line only, for it necessarily imports heir male as well as heir of line. Had the service been *tanquam legitimus et propinquior hæres lineæ*, this would have clearly denoted that he did not choose to claim or to be served as heir male, or, *vice versa*, had it been as heir male, this could not have included heir of line ; but *legitimus et propinquior hæres*, was virtually and necessarily a service in both characters, and entitled him to succeed to whatever rights were devised, either to the one line of heirship or to the other.

Livingstone v.
Menzie, Jan.
12, 1706, For-
bes' Dec.

" As to the case of Livingstone, the state of it given by Forbes is most indistinct ; and it is remarkable, that although Fountainhall wrote at the same period, and gives us a decision of the very same date, 22d January 1706, yet the case of Livingstone is not to be found there of that date ; but we have that same case in Fountainhall, of date 13th December 1705, and likewise of three other dates, 25th Feb. 17th June, and 31st December 1707, but in none of them is it said, that any such point was determined as is contained in Forbes, from which it is highly probable that Forbes was in some mistake about the matter. Indeed his statement is so inaccurate that nothing can be made of it. He does not recite the precise words or tenor of the brieve, or of the retour. In one part, he says, Alexander was served heir general of line to his father ; in another part he says, Alexander being served heir general and special of line, as eldest son to his father, had established in his person all that could belong to him by that propinquity, in the same manner as a special service includes the general. He further says, that even without a service, Alexander had a right to the obligation in his favour by the contract of marriage ; and, without giving the words of the decision, he concludes with saying, that the Lords found, ' that Alexander's general retour, as heir of line to his father, gave ' him the benefit of the provision contained in the said contract, and

‘enabled him to dispoise in favour of his brother.’ If the right were such as to pass without any service at all, there could be no doubt as to the result; or if it was a general special service, or both a general and special service, the decision was of course the same with that of Lord Dalhousie; or if the words were *legitimus et propinquior hæres* in general, without specifying heir of line, it was similar to the case of Haldane. But if it was a mere general service as heir of line, and if this was found sufficient to carry a provision in favour of the heir of a particular marriage, which would not have been otherwise carried, this would have been a decision so entirely new, and against all former principle, that it could not possibly have escaped Lord Fountainhall, who was so full and so accurate an observer of every decision which had passed at the period, and particularly as he has handed down to us no less than four decisions in that same competition.

1805.

BLANE
v.
EARL OF
CASSILLIS, &c.

“ Lord Kaimes, who notices the decision in the second volume of the Dictionary, p. 345, seems to consider the after case of Edgar v. Maxwell in 1738, as an alteration of the principle laid down.

“ The case of Haldane is truly not against the principle, when duly attended to and understood, yet is so far important that it seems to give some opening to loose reasoning upon the subject, perhaps it would have been better that the term *legitimus et propinquior hæres*, had, in all circumstances, been construed to denote heir of line only, in the same way, as many questions would have been avoided had the same construction been given to *heirs whatsoever*. Lawyers are apt to reason too much from analogy, and when once the smallest chink is open, every endeavour is used to make the breach gradually wider. But in no case has it ever yet been found, or so much as argued, till the present occurred, that a general service, under the technical description of heir male and of line, was in any respect tantamount to a service as heir of provision, to the effect of taking up special subjects contained in a destination to particular substitute heirs, not called under the general characters.

“ The recent case of Colvin is a decision in point to the contrary, and it would be doing injustice to the memory of the late Justice Clerk, who gave a clear opinion for that decision, and noticed that it was different from the case of Haldane, to suppose that he had altered his opinion, when, as Ordinary in the Outer House, upon too hasty a consideration of this cause, he pronounced the first interlocutor, which has since been varied by the Court. He was at that time in a bad state of health, and having left the Court altogether soon after, he had no opportunity of reconsidering the case, with all the lights which have since been thrown upon it, from which he would clearly have seen that the present case was as different from that of Haldane, as he himself had declared Colvin’s to be.

1797.
Unreported.

1805.

 BLANE
 v.
 EARL OF
 CABRILLIS, &c

“ The petitioner seems desirous that the Court should adopt a very short system as to this matter of service ; for he says, it is enough that A. B. is found, either by an inquest, or even by a decree of declarator of this Court, to be the son of C. D., without any other adjunction or quality of heirship.

“ If the object of a service was merely to prove *identity*, and not to establish *representation*, or to transmit from the dead to the living, this would certainly be true. If the person whose identity is to be established be an institute, he has no occasion for a service ; and it is enough for him to bring such proof as may be necessary, in any action or cause where his title is called in question. If he be an heir, he may bring that proof in the service itself, *e. g.* he may be called under some general description, such as is alluded to in p. 17. or such as frequently happens where the descendents of such a person are called ; for the claimant must prove that he is descended of that person ; but still he must claim, as an heir to the person whose succession he is taking up, and the doctrine of proving identity alone, is adverse to every principle of the law as to services.

“ Cases may be figured, where a service is impracticable, and then recourse must be had to a declaratory process before the supreme Court for supplying the defect ; but still, this is nothing to the general rule, especially as, even there, some form is necessary to connect the heir with the ancestor, as with the subject in question.

“ The reason why a special service includes a general one of the same kind, is not what the petitioner supposes, that the Court goes upon any loose idea of equivalents, but that a special service is truly a general service, the brieve and retour being one and the same as to both, without the addition only of certain forms in the special service, to connect the claimant with the ancestor's infeftment in a particular subject. It begins with that which constitutes a general service, and concludes with the necessary form of a special one.

“ In short, in every case, and in all circumstances, a service is necessary to carry heritable succession ; and it is scarcely to be held as an exception from this rule, that where the heir declines to serve, a creditor, either of an ancestor or heir, may, by express statute, supply this want, by a charge or charges to enter, and by an adjudication proceeding thereon, which is a remedy very properly introduced by positive law, in certain circumstances, and is an additional proof in favour of a general rule.

“ It is equally clear that the nature of the service, and the character under which the claimant means to connect himself, must be precisely defined, for this plain reason, that one may choose to represent his ancestor in a particular character, and reject his succession in any other character. Even the eldest son may choose to be heir of tailzie or provision to his father, without assuming the character of heir of line or heir male ; though these are also in him by law, or, *vice versa*, he may choose to be heir at law, or heir

male without being heir of tailzie or provision ; nay, he may have it in view to challenge any tailzie or provision executed by his father, and to make up a title by service, as heir of line, &c., for that very purpose. To challenge his father's deeds, on the head of fraud or incapacity, requires a title ; but, were he to make up that title under the deed itself, his challenge would be barred. .

1805.

BLANE
v.
EARL OF
CASSILLIS, &c.

“ When the petitioner says that there is proof on the record of Earl David's service, that he is the very person who is heir of tailzie or provision, under the settlement 1748, he means only to state a fact which is not disputed, viz. that he *might have served* heir of tailzie and provision under that deed, if he had been so inclined ; but as he never actually did so, on the contrary seems carefully to have avoided it, the argument is inconclusive.”

Vide President's Campbell's Session Papers, Vol. 107.

The other Judges remained of opinion as before, but, as to the alteration of the interlocutor, there is the following note on Lord Meadowbank's Session Papers, written by his Lordship.

16th November 1802.

“ The interlocutor altered ; but there were seven to seven Judges. The Lord President was for the former interlocutor, but, having no vote, the judgment was altered. Lord Glenlee did not vote, being one of the trustees for Lord Cassillis.”

Against the interlocutor last pronounced, the present appeal was brought by the appellant to the House of Lords.

Pleaded for the Appellant.—1. The settlement executed by Sir Thomas Kennedy, afterwards Earl of Cassillis, in the year 1748, of the whole lands and estate then belonging to him, or which he should afterwards acquire, was meant and intended to be, and did remain at his death, the settlement ruling the destination of all his lands and estates except the entailed estates belonging to him as Earl of Cassillis. 2. Earl David's service, as heir male, and of line to his brother Thomas, Earl of Cassillis, did not vest in him the character of heir of provision under the said disposition or deed of entail executed in 1748 ; but Sir A. Cathcart is now heir of provision therein, and entitled to take up the possession to the whole lands and estates now in question in that character. 3. The settlement executed in the year 1748 was not meant nor intended to be, nor was in any shape, effectually altered by the procuratory of resignation and charter 1774, which destined a part of these lands to Earl Thomas, and his heirs and assignees, or by other destination for temporary

1805.

 BLANE
 v.
 EARL OF
 CASSILLIS, &c.

purposes, of other parts of his estates, in similar terms; but the same must be construed in conformity to the destination of the lands contained in the previous settlement, and that therefore the estate could only be taken up by a service as heir of provision under the deed 1748. Or at least, 2dly, That though the heir at law might be entitled to take up the estate under the destination to heirs and assignees, yet he could only do so to the effect of disposing it to the heirs of provision in the deed 1748, in the order in which they were called; and that he had it not in his power to alter the destination by any gratuitous deed which he might think proper to execute, to the prejudice of the heirs of provision, or any of them. 4. Although Earl David had completed the most formal and unexceptionable titles, in the proper character as heir of tailzie and provision, still he could not have altered the order of the succession, because the disposition and entail of 1748, and all the subsequent titles of Earl Thomas founded thereon, implied a prohibition to alter the order of succession thereby established.

Pleaded for the Respondents.—1. The titles of David, Earl of Cassillis, were perfectly regular and formal; and as he had the estate of Culzean and other lands in which he succeeded to his brother Thomas, Earl of Cassillis, free from any entail or limitation whatever, so that he could alter any destination, and leave them to whom he pleased, he had the most ample power to execute the settlement of 1783 and 1790 in favour of the respondent. 2. In particular, Earl David made up a complete and unexceptionable title to the lands contained in the crown charter 1774 granted to Earl Thomas, and his heirs and assignees whomsoever, and all lands and rights under a similar destination, by his general service in 1776. For even supposing that the destination 1774 was not to be held an alteration of the destination 1748, which it certainly was, yet as that destination *de forma* was to heirs whatsoever, so it must have been regularly taken up by service in the precise same terms. And even supposing that such a destination and service could have implied (which it did not) an obligation upon the heir to hold these lands, taken up by that service, under the conditions of the former destination, yet, Earl David having thus completed the title in the very terms of the destination, whatever it was, was entitled to alter it, against which there was no prohibition whatever. And he accordingly did alter it, by the deeds he executed in 1783 and 1790. The appel-

lant, at one stage of the cause, argued, that there was an implied prohibition in the deed 1748, sufficient to prevent Earl David from altering the order of succession; but this being untenable, seemed to be afterwards abandoned, as all the judges concurred in considering it as destitute of the slightest foundation. 3. The service of David, Earl of Cassillis, in 1776, completely connected him with the deed 1748, executed by Thomas, Earl of Cassillis, by which the lands were settled upon Earl Thomas and the heirs male of his body; whom failing, upon David Kennedy, his only brother german, and the heirs male of his body; whom failing, upon Mr. David Kennedy, his uncle, &c. Thus David Kennedy was called to the succession by name, surname, and designation, as David Kennedy, the only brother german of Thomas, Earl of Cassillis, the disposer, upon the failure of Earl Thomas and his male issue; and the service of Earl David was in the precise words of that settlement: "Qui jurati dicunt, quod quondam Thomas Comes de Cassillis unicus frater germanus Davidis, nunc Comitis de Cassillis, latoris præsentium, obiit ad fidem et pacem, S. D. N. regis absque hæredibus ex suo corpore legitime procreatis. Et quod dictus David Comes de Cassillis est legitimus et propinquior hæres masculus et lineæ dicti quondam Thomæ Comitis de Cassillis, suifratris germani."

1805.

BLANE
v.
EARL OF
CASSILLIS, &c.

This service, with the most absolute certainty, demonstrates that Earl David was the heir of that investiture. It proved, 1st, That Earl Thomas had died without issue; 2d, That Earl David was the heir male; 3d, That he was the heir of line of Earl Thomas; and, 4th, That Earl Thomas was the only brother german of Earl David, or, which was the same thing, that Earl David was the only brother german of Earl Thomas, being the precise description under which he is called by the deed 1748; and therefore the service is precisely applicable to that deed, and necessarily establish him to be the heir under that deed. And the whole train of decisions in the Court of Session, ever since the statute 1693, c. 25, since which period general services were chiefly used, have uniformly proceeded on the principle of giving effect to services which *in græmio*, or *per se*, establish that the person served is the heir of the investiture, although the technical description under which he is heir, such as heir male, or heir of provision, be omitted, refusing, on the other hand, to give effect to services which do not *per se*, and without having recourse to other evidence, establish

1805.

BLANE
v.
EARL OF
CASSILLIS, &c.

that the heir served is the heir of the investiture. A multitude of such cases have been stated ; and it is most material to observe, not only that the principle maintained by the respondent is supported by these cases, where, in circumstances similar to the present, such services have been found to be effectual ; but even by those cases in which the service was not found sufficient, because, in one and all these last cases, the service did not necessarily show, as in others, that the person served was necessarily and absolutely the heir of the investiture. 4th, The title of Earl David to the property, or *dominium utile* of the lands of *Greenan*, *Balvaird*, and *Whitestone*, in which Earl Thomas died infest, is, if possible, still clearer, since his title to these lands was completed by precept of *clare constat*, being equivalent to a special service, and relating expressly to the prior investiture. 5th, There was a complete consolidation of the property and superiority of the lands of *Mackgowanston* and others, by the measures adopted by Earl Thomas, as already explained. But, further, Earl David had a complete right both to the property and superiority, supposing them to be separate estates ; and, besides, both property and superiority had been possessed far beyond the years of prescription, upon a charter from the crown, which included them both, and to which Earl Thomas and Earl David had a complete right. 6th, With regard to the purchases made by Earl Thomas, upon which he had taken infestment, and to which Earl David, it is said, had made up no title whatever, viz. the lands of Enoch and Little Enoch, the lands of Portmark and Polmcadow, the tenements of Maybole, and the teinds conveyed by Crauford of Ardmillan, as mentioned in the interlocutor of the Court of Session, 7th July 1801 ; they were also carried by Earl Thomas' general conveyance to himself ; and the heirs male of his body ; whom failing, to his only brother german, Earl David, and the heirs male of his body, &c. ; and by Earl David's service in 1776, as connecting himself with that deed.

After hearing counsel,

THE LORD CHANCELLOR ELDON, said,

“ MY LORDS,*

“ This is a case of the very greatest importance. In the description of it, all the learning that could be brought to bear on the subject has been drawn out, great industry has been shown, and all the

* Taken partly by Mr. Nolan, counsel, and partly by Mr. Robertson, the solicitor in the cause.

exertions of great talents on one side and on the other have been exhibited. It has also been repeatedly and anxiously considered by the learned Judges in the Court below, and, with great difference of opinion, even among those for whose opinion I have great respect.

1805.

BLANE

v.

EARL OF
CASSILLIS, &c.

“ This cause contains that species of question which is to be most delicately touched in this House, where so few of the profession of the law at present have seats, and when, of these, so few are able to attend. This case depends altogether upon the forms of title in conveyancing. In that science, forms are the vital essence of, and the security of property.

“ The most striking industry and talents have been displayed in this case at your Lordships’ bar, during a hearing of a great many days. Attending to all these circumstances, we cannot venture to decide immediately, in a case of this nicety and importance.

“ There are some points in the judgment on which I entertain considerable doubt ; and the Court has not given an opinion on many of the points which have been discussed.

“ First, it was said in the interlocutor of Lord Braxfield, Justice Clerk, that the deed, 1748, was alterable : as to this, I entertain no doubt whatever, but consider this to be sound law.

“ Another point on which there was great difference of opinion, is, whether the deed of 1748 was altered by the charter 1774. If I were bound to give an opinion as to this, my mind rests in no doubt with regard to it : but this is not the place in which it ought to be decided. It has not been decided in the Court below ; and your Lordships have no original jurisdiction.

“ I will, however, go the length at present of saying, that my opinion leans much to the opinion of the Court, that the service in 1776 is sufficient to connect with the charter 1774 ; but on these I reserve myself till a future occasion.

“ On the other important point in the cause, I have very great doubt indeed. If the service in 1776 is sufficient to connect with these lands through the deed 1748, nine-tenths of the legal propositions on that subject would find their way with great difficulty to the mind of an English lawyer. It is difficult to persuade him, that the finding of a jury can be a finding upon any point but what is put in issue before them ; because, with us, a jury can decide nothing but what is distinctly put before them for decision.

“ But a case of this kind must be looked to with great caution. Here the forms of Scotch proceeding are in question ; and it is impossible to deny, that many cases may be represented as decisions of something more than they really possess or contain—at least there is a plausible ground of argument as to this.

“ Upon this case there are two questions ; first, Is *that* the law of the case which is contained in the last interlocutor of the Court, that Earl David’s service in 1776 necessarily established him to be the heir under the settlement 1748, and vested in him the personal right to the subjects thereby conveyed to him ?

1805.

BLANE
v.EARL OF
CASSILLIS, &c.

"2d, Does it necessarily appear, on comparing the service with the deed of 1748, that Earl David was the heir of provision in that deed ?

"If the law be such as is laid down in these interlocutors, considering how much laxity there is in the law, let us see if there is not the same laxity in the point of fact. On this, therefore, we will have to consider the fact, if it appears necessarily, by the service 1776, that Earl David was heir under the deed 1748 ; and the question of law will have to be thoroughly sifted before coming to a determination hereon.

"I have said so much, not to show a decided opinion on either of the important points in this cause, but to serve as a reason for the motion which I shall submit to you, that the further consideration of this cause should be put off till this day fortnight ; and I pledge myself that it shall not be delayed longer :—so much is due to the anxiety of the parties, the weight of the arguments adduced, and the great importance of the cause, that I may safely avow that I feel some reluctance to come to a decision in a case of this nature, without time to deliberate ; and, feeling such reluctance, I consider that I ought to bind myself by a pledge to be prepared to give my opinion hereon within a limited time."

"I therefore move that the further consideration of this cause should be put off till this day fortnight."—This motion carried.

21st May 1801.

Culzean Cause resumed.

THE LORD CHANCELLOR ELDON said,

"My Lords,

"It is not necessary at present to repeat the considerations which I formerly urged to recommend this great and weighty cause to your particular attention. I shall proceed now to state the grounds of the opinion which I have formed, and to offer for your Lordships' acceptance what appears to me to be the decision proper to come to in this case.

"It is unnecessary to trouble you to go further back, in considering this cause, than the 2d Jan. 1748, when Sir Thomas Kennedy of Culzean, who had succeeded his brother Sir John, executed a settlement of the estates. This deed proceeds upon the recital of the regard which Sir Thomas had for the preservation of his family ; it attached not only on those lands which belonged to him at the time, but on those which he should afterwards acquire. It contains an obligation on the persons called to the succession, to bear the name and arms of Kennedy ; and another clause, by which he obliged his heirs at law to execute all other deeds proper for the legal conveyance of the estates in favour of his heirs of provision.

" This deed made some alterations in the prior limitations of the estate ; but it is not material to notice these, for the appellant, as trustee of Sir Andrew Cathcart, if the limitations of the deed 1748 still subsist, is clearly entitled to claim under these limitations.

1805.

BLANE

v.

EARL OF
CASSILLIS, &c.

" I don't detain you, to state particularly all the instruments executed by Sir Thomas Kennedy and others, till 1774, when he obtained a charter from the crown, of great part of his estates, to himself, his heirs, and assignees. On this charter a great deal of discussion has taken place, as to whether it was to heirs and assignees, in the common meaning of these words ; or whether they were to be considered as of a flexible meaning. It was said that this charter was obtained purely for political objects ; but that, subject to these objects, Sir Thomas had the estate, with remainder, (if I may so apply the term of the English law), to the heirs of the deed 1748. *Ex facie*, however, the charter was taken to Sir Thomas, his heirs and assignees.

" Previously to the passing of this charter, Sir Thomas had purchased other estates, which fell under the limitations of this deed 1748, and were not included in the charter 1774.

" Sir Thomas Kennedy died in 1775. We all know, in point of fact, (I mean to say this without confining it to what is judicially instructed by retours or otherwise, that he left no lawful issue). Previous to his death, we know also as a fact, that he had become Earl of Cassillis. This title descended to David, Earl of Cassillis ; and we know, (though whether we know it judicially or not may be a question,) that Earl David was the person in the destination of the deed 1748 mentioned by the name of David Kennedy.

" I must call your attention to the manner of serving Sir Thomas, as heir to his brother Sir John, in 1747. (Here his Lordship read the particulars of Sir Thomas' service.) Observe, that there was here a finding of the inquest in express terms, that Sir Thomas was nearest and lawful heir of line, heir male, and heir of provision to his father and to his brother Sir John. On this service, there is no room for that species of reasoning, which applies to the present case, where it is admitted, on all hands, that there is a service of heir male and heir of line, but denied that there is a service as heir of provision.

" It became necessary, as your Lordships know, for Earl David to take up the lands, which had been his brother's, out of his *hereditas jascens*, by a form termed a service. When I speak of forms in conveyancing, I must notice that I think these of the very essence of the law. Applying such principles, as we do in this country, in inquiring into the validity of instruments, we are to look as narrowly to forms as we do to the meaning of the instruments, when we have found the forms to be valid. I don't think the less of this question, that it is one of form ; these are to be strictly adhered to.

1805.

BLANE
v.
EARL OF
CASSILLIS, &c.

“ After the death of Earl Thomas, David sued out a brieve from Chancery in Scotland, to be served his heir. I wish to notice the particulars of this proceeding of a retour. It appears to me, that, attending to the forms of services, they are, strictly speaking, a species of judicial inquiry, in which the jury decide of certain facts. In our end of the island, if a jury were to go, in their inquiries, beyond what was referred to them by the king's writ, their decision would go for nothing. It would be understood to have so much effect only as was entrusted to them, and that every thing else was surplusage.

“ I must admit, however, that I know not how to apply this strict rule to all the decided cases which have been quoted to us ; for it appears from some of these, that if the fact found by the jury demonstrates the truth of another fact, with which it was pregnant, it has been held that the finding of the jury was not only what they had said expressly, but that it included also what was implied in the fact so found expressly.

“ After taking out the brieve, Earl David gave in his claim to the *Goodmen of Inquest*, in these terms. (Here his Lordship read the same.) Observe here, that he claims ‘ to be the nearest and lawful heir male and of line in general ’ to Earl Thomas, his brother german. In the first part of the claim, Thomas is styled his *only brother german* ; but this was only descriptive of Earl Thomas, the claim for the service was as I have stated.

“ To an English lawyer, I should have said that the meaning of the claim, if made in this country, was, to serve Earl David heir male, and heir of line to his brother ; not to serve him only *brother german* to Thomas, Earl of Cassillis, but heir male and heir of line to his said deceased brother.

(Here his Lordship read the further proceedings in the service.)

“ The evidence, therefore, is affirmatively on the brieve and claim, and that Thomas, Earl of Cassillis, died without lawful issue of his body. The jury find, that Earl David is ‘ nearest and lawful heir ‘ male and of line in general ’ to Earl Thomas, his brother german, conform to the brieve, claim, and instructions thereof, on all points. But, according to all English construction, the act of the jury would be clearly a service and cognition of Earl David, not as brother german, but as heir male and of line to Earl Thomas, the other fact being the medium of proof by which they arrive at this conclusion.

“ When I say this, I mean a construction unprejudiced by the decisions. After giving all the attention in my power to the argument in the Court below, and to the decided cases, it appears to me (unless there be an exception as to heirs of provision,) that the Court have gone the length of saying this, that if the finding of this Inquest necessarily established the character of the person served, if the cognition of one title necessarily amounted to the cognition of another, this has been considered by the Court as a service in that other character.

"Independently of all the decisions upon this subject, and of all that occurs to the mind of a lawyer, taught caution in reviewing questions from a Court, which he is bound always to respect, and particularly in cases which have relation to the titles of landed property in Scotland; and in a case like this, to which attention so extraordinary has been paid, if no case had been decided bearing upon this subject, I do not think that a mind misled, perhaps as mine must be, by English decisions, could doubt that this was not a service as heir of provision. But whatever your Lordships might have thought of such a case, if it had come originally before you, you will take care not to decide it on any principle that may endanger the titles of landed estates in Scotland.

"The very large property at stake in the present cause, and the great importance, in every point of view, of the question at issue, have led into all the litigation that has taken place. Two principal questions were brought forward here, involving other questions, some of which were fully canvassed in the Court below; others of them were treated but not decided in that Court, and there may not be occasion to decide them here.

"The first question was, Whether the service of Earl David, which I have particularly stated, did so connect him with the lands contained in the deed of 1748, which were also contained in the charter 1774, as to enable him, under that charter, to say that he was heir of provision as to these lands, under the deed 1748? Or, whether, by the service expedited, and acts done by Earl David, an obstacle was not put in the way of his conveying the lands, the succession to which was regulated by the deed 1748, but which lands were not contained in the charter 1774.

"This depends upon the language of the first and last interlocutors appealed from. The first interlocutor lays down the position, that Earl David's service, as heir male and of line to his brother Earl Thomas, necessarily established him to be heir under the settlement 1748; this is very cautiously expressed. The same principle, and expressed in similar language, occurs in the last interlocutor, finding that Earl David's general service, '*tanquam legitimus et proximior hæres masculus et lineæ* of his only brother german, Earl Thomas, necessarily established him to be the heir under the settlement 1748, and vested in him the personal right to the subjects thereby conveyed to him.'

"The Lord Justice Clerk also, in the first interlocutor, laid down a proposition, into which, or the propriety of affirming that interlocutor upon that point, I entertain no doubt, namely, that the settlement 1748, was alterable at pleasure. It was a proposition involved in the course of the argument, whether, if Earl David had made up the most unquestionable titles, he could gratuitously have altered the deed 1748. With reference to this, I shall only say a

1805.

BLANE
v.EARL OF
CASSILLIS, &c.

1805.

BLANE
v.
EARL OF
CASSILLIS, &c.

single word. Attending to the doctrines laid down by this House, and by the Court of Session, on the import of prohibitory, irritant, and resolute clauses, I cannot entertain any doubt of Earl David's right to alter, provided he made up proper titles to the property.

"The Court of Session has varied extremely in opinion, Whether Earl David's service was to operate as a service as heir of provision or not? or, in other language, whether or not it necessarily established him to be heir under the deed 1748? Upon this part of the case I feel myself in very considerable doubt indeed.

"The other question, as to the import of the charter 1774, is of a different kind. By that charter, the lands are expressly limited on the face of it to Earl Thomas, his heirs and assignees. Earl David certainly made up a title as heir, in terms of that charter, and we know that, in point of fact, he was also the person called by the deed 1748. Upon going through all the reasoning upon this subject, and a very laborious investigation with regard to it, it does appear to me, that what is laid down with regard to it in the interlocutors of the 15th and 16th of January 1801 is right. The construction of that interlocutor is, that if the service of 1776 was sufficient in point of form to connect Earl David with the lands contained in that charter, it was also sufficient in law. I submit it, therefore, as my opinion, that this title was good as against those claiming under the deed 1748.

"It is on the other part of the case that my difficulties chiefly lie, namely, whether Earl David's service, as heir male and heir of line, necessarily established him to be also heir of provision under the deed 1748. The proposition comes to this, that under such a writ as was sued out, and such a claim as was made in this case, and the jury having, under that claim, found him to be heir male and heir of line in general to Thomas, Earl of Cassillis, his brother german, it is to be held that such service implied also that he was heir of provision to him under the deed 1748.

"On considering the effect of retours, as decrees, as conveyances, their operation as charging the person served with passive titles, their effect as to the law of prescription, the services that must be made up to enable a person in certain cases to bring actions of reduction, and, in general, as affected by all the doctrines which have been so elaborately explained to us, difficulties occur worthy of great attention. It is difficult to reconcile one's mind to this, that when a jury are called upon to serve a man heir for one purpose, they shall be held, for all active as well as passive purposes, to have cognosed him heir in a character which he did not claim.

"We are not, however, to consider this question in the abstract, but must take into view the decisions that bear upon it. It appears to me, that some of these decisions are contradictory to others; and

from them the positive and negative of the same propositions may be inferred.

1805.

"If I were obliged to address myself to decide this point at present, I should feel more doubt and difficulty than I have felt on any similar occasion. Considering this to be one of the most important cases, in regard to the security of titles to landed estates in Scotland, that can exist, (though, from the protracted litigation, it is desirable that it were finally decided), I am disposed to desire that the Court should look at this part of the cause again. Were I not influenced by the reasons which incline me to withhold my opinion on this part of the case, I should say that I think it *very* questionable indeed, if it be established by the service 1776, that Earl David was heir of provision under the deed 1748.

BLANE
v
EARL OF
CASSILLIS, &c.

"The reasons which principally restrain me from deciding, are of this nature. I have looked very narrowly into the cases; and I find that in some of them the implication goes farther than the special finding in the service. But *what* I find in the cases is not the *ground* of all my doubts. *Another reason* which induces me to decline giving a decision hastily, is this, that from what I see in these cases, I am not prepared to state any opinion as to the evidence which the Court of Session looks to in these retours. Does it look at the retours alone? or does it look at the whole of the record? Both the one and the other were asserted here. Another question also is, What is the record? It was said that the retour alone was the record. This appeared something whimsical to an English lawyer. Here the writ, and all the proceedings upon it, would form the record. If a jury here were, in their finding, to go beyond the brieve, all beyond it would go for surplusage. If forty other different facts appeared in the verdict, we should only look at those as the medium of proof. I am not sure, therefore, that any view of this case that I might take, might not trench on the rules of evidence laid down in Scotland as to the titles of landed estates in retours.

"It was said, that you must look at the deed 1748 to understand the import of the retour. I am afraid, it has been clearly shown to us from the bar, that a person may be served heir of provision, without its appearing from the retour under what deed of provision he was so served. In one of the decisions, it is said, that no cases of this sort could be produced. It was said, to challenge all dispute, that if a person was served heir of provision, he would be entitled to take under all deeds of provision.

"It was said, that you may go a great deal further, and look at other deeds to explain the import of the retour; I doubt this extremely: I think either that the retour alone can be looked to, or the retour and the deed of provision, and that you cannot go to other deeds.

"Cases of different kinds (as I noticed before), have been decid-

1805.
 BLANE
 v.
 EARL OF
 CASSILLIS, &c.
 Jan. 12, 1706.
 Forbes' Coll.
 Dict. vol. ii.
 p. 345.

ed upon this. In some of these it is denied that the service is to be confined to the general finding, if another character is necessarily involved in that finding. I allude to one instance of this, the case of *Livingston v. Menzies*, mentioned on the 18th page of the respondent's case. (Here his Lordship read the particulars of this case). A person here was served heir of line of his father, though *prima facie* only so served heir of line, yet it is stated, that this was also necessarily a service as heir male to his father. We should consider this rather as an inference arising from the other fact. But the Court went a step further, and found this to be a service as heir of provision in a certain contract of marriage. This is allowed to be erroneous; for there was nothing to show that the contract might not have related to a second marriage.

"On this case, I ask this question;—if the contract of marriage had been to be the contract on a first marriage, would the service of the son, as heir of line to his father, prove him to be heir of provision, under the contract of marriage? If the retour was to be construed by looking at the contract of marriage, it would appear that the person was heir of that contract.

"The Court, perhaps, a little puzzled with all the cases which have been decided upon this point, appear to have come to a different decision in the late case of *Colvin v. Alison*. It was stated that this being a general service, it could not connect with a right clothed with infestment. But I don't enter into that point. (Here his Lordship read and commented upon the case, from the appellant's printed case.)

"I am not discussing at present if these cases are well or ill decided; but I wish to apply a few short words to them; because a certain part of the property depends upon this, that Earl David's service in 1776, necessarily established him to be heir under the deed of 1748. There may be, nay, there must be, a great difference between the impression made on the mind of an English lawyer by a case like this, and the impression made on the mind of an able Scotch judge; looking attentively to all the cases, with extensive information with regard to them, in which principles familiar to us, may be overlooked.

"With this preface, and speaking as an English lawyer, I may state, that I should have no difficulty in deciding, that the retour of Earl David's service in 1776, if this had been done by an English jury, and on English principles, did not at all apply to the deed of 1748. It appears to me, further, that if the decided cases are applied in aid of principles, and an examination is made of them, if, on comparing the deed 1748 with the retour, from a comparison of the two, it does by no means necessarily follow that Earl David was heir of provision under that deed.

"In the deed 1748, the granter of it is styled Sir Thomas Kennedy of Culzean, Bart.: and the person first called is David Ken-

ned, *his only brother german*. Put the case that Sir Thomas had been mistaken as to this, and that he had then alive another brother, older than David, settled in America or elsewhere, who might have been alive, though then considered by Sir Thomas as dead ;— this fact would not have affected the validity of the limitation to David Kennedy, even though the granter of the deed had been mistaken in describing David Kennedy as his only brother german, that description was not of the essence of the taking character.

1805.

BLANE
v.
EARL OF
CASSILLIS, &c.

“ In the present service, an individual goes before a jury, who, on principle, are to be held as completely ignorant of the facts to be established before them, as any other persons not of the Inquest can be. He tells the jury that he is David, Earl of Cassillis, and that he wishes to be cognosced heir male and heir of line of Thomas, Earl of Cassillis, of whom he says not one word more, than that he was his only brother german, and died without heirs lawfully procreate of his body. These facts established, were only as the medium of proof by which the jury were to arrive at the conclusion that Earl David was heir male and of line to Earl Thomas. If the deed of 1748 had been laid before them, it could only have been also as a medium of evidence.

“ The jury, in their verdict, say that David, Earl of Cassillis, is nearest and lawful *heir male and of line in general* to Thomas, Earl of Cassillis, his brother german. If the Court of Session, in such a case, takes as judicially established, what the jury has said not one word about,—if such be their practice, it ought to be adhered to.

“ Upon what principle can it be urged that this service is more than a service as heir male and heir of line ? But it has been said, that if you push the principle to this extent, you will destroy many cases that have been so decided :—that many retours to heirs of provision exist, in which the particular deed of provision is not mentioned ; and that an alteration of this judgment would endanger those former decided cases.

“ This does not appear to me to be just reasoning. When a person is served heir of provision, and one or all the deeds of provision are not mentioned to be produced, my difficulty would be very different from what it is in the present case. When a jury find a person heir of provision, the law will connect him with all the deeds in which he is found to be heir of provision. The principle is, that the jury, by finding him heir of provision, have found that he was the very person mentioned in these deeds.

“ But when, in a retour, a person is neither served heir of provision, nor heir in certain lands, it is extremely difficult for the Court to say, what the jury say nothing about ; and to take judicial notice of what the Inquest takes no notice whatever.

“ According to the case lately put, if Earl Thomas had another brother, older than Earl David, whom he supposed to be dead, when he executed the deed of provision 1748, this might have involved a great

1805.

 BLANE
 v.
 EARL OF
 CASSILLIS, &c.

a monstrous difficulty, with regard to the service. After Earl David was served in the manner now in question, and with this medium of proof, his brother might then have come home, and have reduced the service, as heir male and heir of line. Thus he would have falsified the only facts on which it could be alleged that Earl David was heir of provision, for he would have proved that Earl David was not *unicus frater germanus* of Earl Thomas. Could it still have been maintained, in such a case, that the service was a good service as heir of provision under the deed of 1748?

“ It was said that the words ‘ *obiit sine haeredibus*,’ &c. were equivocal, and that he might have had issue who had survived him, but who were dead at the time of the service. So far have these hypotheses been carried, in some cases, that the bare possibility of having issue, though it was known to every body that there was issue, has been started against going to the presumption in a case like the present.

“ Mr. Clerk put another ingenious case, that as Earl Thomas had a power of revoking the deed of 1748, in whole or in part, he might have revoked it to the effect of striking Earl David out of it, and the remainder of the deed would still have been effectual. Earl David would still have been entitled to be served heir male and heir of line, as only brother german to Earl Thomas, and yet he would not have been his heir of provision, because he was struck out of the deed. It was clear, therefore, that Earl David might have possessed all the characters mentioned in the retour, and not have been heir of provision.

“ There were other hypotheses put, but I shall not go into them, as they were not much discussed in the Court below. At this moment, I cannot bring my mind to think that Earl David was found heir of provision under the deed 1748; but I do not wish to decide upon it, as the whole bearings may be better known by others in Scotland.

“ On the whole, I would offer a proposition, that the interlocutors are right as to the lands contained in the charter 1774. As to the lands not contained in that charter, so far as the right of the Earl of Cassillis thereto is sustained, I think it may be proper to remit this matter to the Court of Session, to call their attention again to the consideration of the topics which I have suggested—taking the retour, *per se*, as part of the record, connecting it with the deed of 1748, as far as its meaning can be legally collected from that deed; and then calling upon them to decide, not from what they know, but from what has been found by the Inquisition, whether or not Earl David was heir of the deed 1748. Entertaining much respect for the Court of Session, I think a remit on this point will give them room to consider the rules of law on a doubtful and difficult question.

“ I must still request a few days to put into form what I may con-

ceive it expedient to propose to your Lordships as a fit judgment in this case."

1805.

ROCHEID
v.
KINLOCH, &c.

It was ordered and adjudged, that all the interlocutors complained of in the appeal, so far as the same relate to the lands and subjects contained in the charter of 1774, or in any similar titles, be, and the same are hereby affirmed; and it is further ordered that the cause be remitted back to the Court of Session to review all the interlocutors, so far as they respect the effect of the service of Earl David in 1776, with regard to the lands of Enoch and Little Enoch, the lands of Portmark and Polmeadow, the tenements of Maybole, and teinds conveyed by Craufurd of Ardmillan, or any other lands or subjects, the title to which is in dispute in this cause, if any such there be, not ruled by the foresaid affirmance; and to hear the parties again as to the effect of the said service as to the said lands and teinds, and as to the right to the said lands and subjects, and to do thereupon as the Court shall seem meet.

For Appellant, *Sir Samuel Romilly, Cha. Hay, Math. Ross, John Clerk.*

For Respondents, *Wm. Adam, Ad. Rolland, H. Erskine, D. Cathcart.*

NOTE.—For subsequent appeal in same case, vide *infra*. Two later decisions are reported by Baron Hume, *Ogilvy v. Ogilvy*, 5th June 1817, Hume, p. 724, and the Duke of Queensberry *v. The Earl of Wemyss*, 21st Jan. 1819, Hume, p. 727, of great importance in this branch of law. The recent act 10 and 11 Vict. c. 47, regarding services, provides, that persons who claim to be served heir of provision in general or in special, the deed under which they so claim must be distinctly mentioned.

[Fac. Coll. Vol. xii. p. 408.]

JAMES ROCHEID of Inverleith, - - - *Appellant*;
SIR ALEX. KINLOCH, Bart., and Others, - - - *Respondents*.

(*Et c contra.*)

House of Lords, 28th May 1805.

OBLIGATION TO ENTAIL—PRESCRIPTION—INTERRUPTION—MINORITY.

—In executing a settlement in the form of an entail, a certain portion of the lady's estate was directed to be sold, and, after paying debts

1805.

ROCHEID
v.
KINLOCH, &c.

and legacies, the surplus ordered to be laid out in the purchase of other parts of the land to be entailed. The disponees, under this deed, uplifted the funds, a great proportion of which consisted of heritable debts and houses, but the money was never applied in the purchase of land as directed. The forty years' prescription elapsed. In an action brought to compel fulfilment of this obligation, Held that prescription of forty years had extinguished the obligation, except as to part of the heritable estate, to which a title had been made up within the forty years, and the debts, of which it was composed, paid.

Sir James Rocheid of Inverleith died, leaving one son and four daughters, Magdaline, Janet, Mary, and Elizabeth. On his son's death, without issue, the estate descended to his four daughters equally, share and share alike. Magdaline was married to Colonel Cathcart, and Janet to Sir David Dalrymple of Hailes, and their shares descended to their sons. Mary, one of the daughters, was married to Sir Francis Kinloch of Gilmerton, by whom there was numerous issue—three sons—of whom the appellant's father, Alexander Kinloch, afterwards Rocheid, was the third son.

Elizabeth, the youngest daughter of Sir James Rocheid, never married; and having, besides her one-fourth share of the estate of Inverleith, acquired, by purchase, right to another fourth of the estate, she was feudal proprietor of the Inverleith estate to the extent of one half.

In these circumstances, and anxious to perpetuate the name of Rocheid of Inverleith, she executed a settlement
Jan. 14, 1749. and deed of entail, by which she conveyed to Alexander Kinloch, third son of Sir Francis Kinloch of Gilmerton, and father to the respondent, and the heirs whatsoever of his body, whom failing, to a series of substitutes, (being the issue of her sister Mary's marriage with Sir Francis Kinloch). The entail contained the conditions of bearing the name and arms of Rocheid of Inverleith, and was fortified with prohibitory, irritant, and resolute clauses.

By a separate clause in the same deed, out of which the present question arises, she did "assign, transfer, and dis-
"pone to and in favour of the said Alexander Kinloch, and
"the heirs whatsoever of his body; whom failing, to the
"other heirs of tailzie and provision above specified, ac-
"cording to the order and rules of succession above ex-
"pressed; whom all failing, to my own nearest heirs and
"their assignees, with and under the conditions, provisions,
"reservations, power and faculty after mentioned, all and

“ whole those two dwelling houses and cellars lying in
 “ Merlin wynd, with their pertinents ; as also all and whole
 “ my other lands and real estate, heritable and moveable
 “ debts and sums of money, &c. resting pertaining to me, or
 “ that shall be resting owing to me at the time of my de-
 “ cease, with all dispositions, &c., dispensing with the gene-
 “ rality hereof.” Declaring he and they should “ be bound
 “ and obliged to *pay all the debts, legacies, and other dona-*
 “ *tions* which shall be due and bequeathed by me at the
 “ time of my death ; *and, after payment thereof,* shall be
 “ bound and obliged to bestow and employ THE SURPLUS of
 “ the said heritable and moveable debts before disposed,
 “ and the price of the said house, so far as belongs to them,
 “ when sold, for purchasing and acquiring the remainder of
 “ the said estate of Inverleith and Darnchester, with the
 “ pertinents above specified, from those who shall have right
 “ thereto for the time (in case they shall incline to dispose
 “ of the same), and that to the value and extent of such
 “ surplus.”

1805.

ROCHEID

v.

KINLOCH, &c.

On Mrs. Elizabeth Rocheid's death, which happened on
 8th Dec. 1753, Alexander Kinloch succeeded, as institute in Dec. 8, 1753.
 the entail of the Inverleith estate ; and also to the other
 heritable and moveable estates above disposed, the most
 valuable part of which consisted of heritable bonds to the
 amount of £6000 and upwards.

It was conceived that the conveyance of this part of the
 estate to Sir Alexander was absolute—that he had unlimit-
 ed power over it, being only bound to account to the sub-
 stitutes in the entail, if called on to do so in due time.
 Alexander, the appellant's father, therefore, completed titles
 to the entailed estates separately. He confirmed to the
 moveable estate, and had recovered several of the bonds,
 and had paid off her debts, legacies, and donations, when
 he died, without having made up any feudal title to the he- May 14, 1755.
 ritable subjects generally, conveyed by Mrs. Elizabeth
 Rocheid's disposition. He left a settlement, assigning and
 disposing to the appellant, “ and the heirs of his body ;
 “ whom failing, to his second and third sons, and the heirs
 “ of their bodies ; whom failing, to his own nearest heirs
 “ and assignees whatsoever, all and sundry lands, heritages,
 “ annual rents, liferents, woods, fishings, adjudications,
 “ debts, sums of money, &c., both heritable and moveable,
 “ which should pertain and belong to him at the time of his
 “ death.” The appellant was confirmed, and gave up in his

1805. tutorial inventory the debts due to the late Mrs. Elizabeth Rocheid, amounting to £6000 nearly.
- ROCHEID**
v.
KINLOCH, &c. The appellant's father, as already said, had a complete personal right to the heritable part of Mrs. Rocheid's estate, which he effectually transferred by the above general disposition to the appellant. In February and July 1756 his tutors completed his title to this estate by adjudication in implement, against Mrs. Rocheid's heirs, adjudging from them the said subjects. The subjects so adjudged from the heirs of Mrs. Rocheid were, 1. An heritable bond for £3000 due by the Earl of Kinnoul. 2. An heritable bond of £6000 Scots, of which there was due £125 by the Earl of Home. 3. The half of a dwelling house in Craig's close, Edinburgh. The house in Merlin's wynd was specially conveyed to the appellant's father, so that no adjudication was necessary as to it. The decree in the above adjudication bore special reference to the entail, and to the purpose for which these debts were to be applied.
- With regard to Mr. Baird of Newbyth's debt, it was the only debt unuplifted by his father at his death. In 1772 this debt was paid to the appellant, as executor of his father, not as donee of Mrs. Rocheid. The debt due by the Earl of Kinnoul, the appellant's tutors, after expeding a crown charter under the above adjudication, received payment, and discharged the debt in 1757. The Earl of Home's debt stood in the same situation, and was paid to the appellant in 1771. A feudal title had been made up by his father to the house in Craig's close, but, in February 1754, he concurred with the proprietor of the other half in selling that house for £800, and having made up his titles by adjudication as above, the price was paid to the appellant's tutors in 1758. The appellant's father had a complete *personal* right to the house in Merlin's wynd, which he effectually conveyed by his general disposition, but no steps were yet taken to complete the feudal right until 1787, when that
- May 24, 1787. house requiring to be sold, he granted a disposition, after attaining age, of the three-fourths of the said house to Kinloch's trustees, to be applied under the purposes of the deed of entail.
- Nov. 23 and 25, 1796. Of this date, and more than ten years after the death of Mrs. Elizabeth Rocheid, the respondents, substitute heirs of entail under her tailzie, brought the present action against the appellant to account for his own and his father's intrusions with her effects, and to compel him to lay out the

surplus thereof in the purchase of lands, as directed by her settlement. The defence stated was, that the respondents' right of action was cut off by the negative prescription of forty years, which operated as a discharge of the personal obligation contained in the tailzie. Three questions were thus debated, 1. Whether there was in this case *termini habiles* for the plea of prescription ; 2d. Whether the prescription was interrupted as to all or any of the funds in question by the acts of administration had ; and, 3. Whether the respondents were entitled to insist that their alleged minorities should be deducted.

1805.

ROCHEID
v.

KINLOCH, &c.

In regard to the first point, the respondents contended that tailzies existed before the statute 1685, and were recognized as a part of the common law. That this act only imposed certain restrictions and regulations on the common law as previously existing. And, assuming that this part of Elizabeth Rocheid's estate must be viewed as moveable, there was nothing to prevent a person from making a tailzie of his moveable estate. It may be more difficult to make tailzies of moveables effectual against third parties, or even *inter hæredes*. This, however, arises, not from want of power in the disponent, but in the nature of the subject. It was not essential to the nature of an entail, that it should be effectual against third parties ; and though an heir of entail, in possession of a moveable estate, may *de facto* contrive to dilapidate or spend it, he is no more entitled *de jure* to do so, or to divert it from the order of succession among the different substitutes, than if it were a tailzied land estate. When Mrs. Rocheid's settlement is considered in this light, it will be seen at once that it is a virtual entail of the funds in question, by which these funds are conveyed, in the first place, to the appellant's father, who was not Mrs. Rocheid's heir *alioquin successurus*, and, after his death, they are destined to a series of substitutes, who were not his heirs *alioqui successuri*. Besides, the appellant's father was positively directed to execute an entail of the lands so to be purchased with the surplus fund ; and this direction to purchase and entail lands upon a certain series of heirs, was not merely a personal obligation upon the appellant's father ; but it was the condition upon which the funds were conveyed to him. And the general disposition which the appellant's father executed in his favour cannot affect this fund, nor alter the right of parties. The settlement of Mrs. Rocheid was his father's sole right to these funds, as well as his

1805.
 —————
 ROCHEID
 v.
 KIMLOCH, &c.

own, and he cannot plead a prescription of that title. *Second*, Even if prescription applied, it has been interrupted in two ways. 1. As to some of the funds, by the titles which the appellant made up, and the infestment of the house in Craig's close, &c., within the forty years. 2. As to others of the funds, by the circumstance of his tutors having uplifted them within the years of prescription. Besides, he completed his title to the moveable estate beyond the forty years, and also made up title by adjudication in implement, which bears date beyond the forty years. It was therefore argued that these titles were an interruption of prescription, because they acknowledged the original obligation to entail these funds, and amounted to a renewal of the obligation. Besides, there is a second kind of interruption, within the forty years, namely, the uplifting the debt of Baird of Newbyth and Earl of Home. *Third*, And supposing interruption not made out, prescription still did not apply, because of the respondents' minorities—the general rule being, that every creditor in a personal obligation is entitled to have his minority deducted; and it is no answer to this to say, that the respondents are an aggregate body, and heirs substitutes merely, because minority is a bar as much in the one case as the other. To this the appellant answered,—*First*, On attending to the nature of the funds in question, and to Mrs. Rocheid's settlement, it is evident that these funds, including the price which might be obtained for the house directed to be sold, were not capable of being entailed; and that, in point of fact, she did not execute, nor intend to execute any such entail of these funds. Tailzies, besides, of moveable funds are unknown in the law of Scotland, and are confined solely to heritable subjects, and generally to landed estate. *Second*, This necessarily reduces the obligation contained in her settlement to a mere personal obligation, which being prescribed by the negative prescription of forty years, is no longer binding on the appellant. There has been no interruption of this prescription, neither by the completing title and infestments alluded to, nor the uplifting certain funds within the forty years. These can never be construed, under the statute, as amounting to taking of document by the creditor upon his obligation of debt. These were mere titles made up to different debts, and the making up of these titles is rather to be ascribed to the appellant's absolute right than to prove that the obligation in this deed of entail and settle-

ment is a subsisting obligation. And it cannot be maintained, that because certain debts were uplifted, that this is equivalent to a document taken in favour of the respondents.

1805.

Third, Nor can the minorities pleaded form a deduction from the prescription, because substitute heirs of entail are not entitled to have their minorities deducted, which, if otherwise the case, and allowed to them as a body, such obligations could never prescribe. And, in support of this plea, he refers to the cases of Mackerston, Kinnaldie, Whiteley, Auchindachy.

ROCHEID
v.
KINLOCH, &c.

The Lords pronounced this interlocutor: "Sustain the Dec. 18, 1799. defence of prescription pleaded by the defender *against a general accounting*; but repel the defence of prescription "so far as concerns the debts *originally* due by Mr. Baird "of Newbyth and Earl of Home, and the price received "from the trustees for building the South Bridge for the "house in Merlin's wynd: Find the defender bound to account and to apply these sums in terms of Mrs. Elizabeth "Rocheid's settlement, and remit to the Lord Ordinary to "proceed accordingly." On reclaiming petition, the Court May 27, 1800. adhered to their former interlocutor, but remit to the Lord Ordinary "to hear parties further on the defence of prescription, in so far as concerns the debt due by the Earl "of Kinnoul, the price of the house in Craig's close; and "also so far as concerns any other debts *in pari casu*, reserving always to Mr. Rocheid his objections to being "liable to such debts as accords, and with power to his "Lordship to determine therein as to his Lordship shall "seem just."*

* Opinions of the Judges.

LORD PRESIDENT CAMPBELL said:—"According to the principle of the last judgment, it is now pretty clear that Lord Kinnoul's debt, and the price of the house in Craig's close, stand in the same situation with the particulars mentioned in the interlocutor. As to the bank shares, &c., the circumstances are not explained, and no sufficient evidence appears about them, and therefore the question, as to them, seems to depend on the general count and reckoning, namely, Whether the general accounting is barred by the negative prescription? This again may depend on another point, viz. Whether there was here a partial interruption, sufficient to keep open the prescription as to the whole? In certain cases partial interruption has such effect. But partial payments or acknowledgments of debt may or may not, according to circumstances, have that effect, see *Kilkerran, Voce Prescription*. In the present case, the settlement has, in numerous par-

1805.

ROCHEID
v.
KINLOCH, &CO.

Against these interlocutors, in which these opinions were given, the present appeal was brought by the appellant, in so far as they repel the defence of prescription in regard

particulars, been homologated and implemented within the years of prescription; but I doubt if it can be inferred from thence, that in other particulars it was not already satisfied, especially as general sums have actually been applied, and debts and legacies were to be paid. In short, a more general count and reckoning seems to come too late, unless it can be barred by minorities, as to which, see the argument in the Bargany cause.

“ This argument supposes a tailzied succession, and a *jus agendi* arising out of it, which being not of the nature of a specific demand for payment, or for possession, belonging to an individual, but a remedy given by the law to a class or description of men, does not admit of the deduction of minority, otherwise it would be unprescriptable.

“ As to the particular subjects which have been traced as falling under the settlement, and which continued to be possessed or enjoyed in the express terms of it, by the late Mr. Rocheid and the defender himself, till within the years of prescription, and some of which may still be in his possession, it is thought the action does not come too late.

“ The houses in Merlin's wynd were specially conveyed. The other subjects by general description. But the house in Craig's close, and the two heritable debts, were taken up by adjudication in implement, upon the title of a service to Mrs. Elizabeth Rocheid, and the adjudication was expressly in terms of the settlement. All these subjects, therefore, were taken and possessed under the destination contained in the settlement, and with a reference to the clauses and conditions therein. They were, therefore, held as tailzied subjects, and as the defender was not limited in point of time with regard to the power of disposing of them, and purchasing lands in their place, to be added to the entail, so, while he continued to hold them in that manner, upon the original securities, and upon the titles made up by himself as heir of entail, it cannot be said that he, in any shape, counteracted (contravened?) the entail, or did any thing which should have given rise to an action against him, at the instance of after heirs, for a more full and complete implement.

Earl of Dal-
housie v.
Maul, 1 Mar.
1782.
Mor. 10963.

“ In the case of Lord Panmure's settlement, and particularly on the question regarding the leases (1st March 1782,) Earl of Dalhousie, it was laid down that the law did not require an action merely to interrupt prescription, when nothing beneficial could be taken from it. That an action was no doubt competent to oblige the heir in possession to make up titles under the tailzie; but if the heir had already made up such titles, or if it was a subject which did not require any title to be made up, such as a lease, the action

to Baird of Newbyth's debt, &c. And a cross appeal was brought by the respondent, in so far as it sustained the defence of prescription to a general accounting.

1803.

ROCHEID
v.

KINLOCH, &c.

became unnecessary ; and there was no occasion to make any claim till the succession opened, or till something was done by the heir in possession contrary to the tailzie.

" In the present case, the respondent and his father did every thing in implement of the tailzie, and did nothing contrary to it, so far as regards the particular subjects thus taken up by them, unless in so far as some of them may have been misapplied, or made away with, within the years of prescription.

" The defender succeeded to, and held these subjects as heir of entail, and, by the nature of the settlement, he could not dispose of them without re-employing the money in the same terms, or in purchasing land to be added to the entailed estate. In so far as he lay under these obligations, he, in effect, was a trustee for all concerned in the succession ; and as we find him in possession of the individual subjects within the years of prescription, so, if he did any thing contrary to his trust, it must have been within that period, and he is still open to challenge.

" In the case of Lady Crauford against Mr. Lockhart of Lee, 28th Jan. 1778, the period when the trust was supposed to have been counteracted, and the succession frustrated, was held as the *terminus a quo*, and it was not supposed to be necessary to go back to any former period.

Pollock (Lady
Crauford) v.
Porterfield,
Widow of
Lockhart of
Lee, Jan. 28,
1778, Mor.
10702

" The death of Mrs. Elizabeth Rocheid in 1753, is the period when the trust commenced, and from which time there was no doubt a possibility of the trust being abused, and therefore it is said we must date the prescription from that period. In one sense this is true ; but it supposes that there was a non-implement from the beginning, or that something was done which should have given rise to an action for implement ; but what room is there for such an action, when the heir has, in fact, proceeded in due course of carrying the settlement into full execution, when he makes up his titles accordingly, while he continues to possess under it, and so long as he takes no step whatever to the contrary ?

" It is said in the petition for Mr. Rocheid, p. 8, 10, 23, &c., that Mrs. Elizabeth's subjects were vested in the late Mr. Rocheid and his son, the defender, absolutely, that their creditors were entitled to attach them, and that there was nothing more in the heirs of entail than a mere personal claim of debt, or damages founded on the settlement. But this is a mistaken view of the case. The subjects never were vested in them absolutely, but under titles qualified and limited by the clauses in the settlement, and, so long as they continued to have only a personal right to these subjects, their creditors could not, by adjudication or otherwise, take any better right out of them, this being a general rule as to personal rights. It is

1805.

ROCHEID
v.
KINLOCH, &c.

On appeal the same argument was repeated.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,

“ My Lords,

“ This is an appeal against certain interlocutors of the Court of Session, in a question, whether the appellant, Mr. Rocheid, should be obliged to account for certain sums of money received by him, in terms of a trust deed executed by Mrs. Elizabeth Rocheid in 1749 ?

“ The matters at issue in this cause are comprehended in the following interlocutor. The respondents having presented a petition to the Court, praying for exhibition of the Sederunt Book of the appellant's tutors and curators, to ascertain the extent, receipt, and application of Mrs. Elizabeth Rocheid's funds, the Court, on 17th December 1799, ‘ refused the desire ’ of that petition ‘ *hoc statu*.’

“ On the 18th December 1799, the Court pronounced this interlocutor on the whole cause. (Here his Lordship read the same.)

“ Both parties reclaimed against this interlocutor; the prayers of their several petitions were, &c. (Here his Lordship read same and subsequent interlocutor, 27th May 1800.)

“ The original appeal is brought against the interlocutor of 18th

true, that after completing the feudal rights by charter and sasine, the defender might have disposed of it, and a creditor or purchaser dealing with him upon the faith of the record, would have been safe, if the tailzie was not completed in proper terms, and duly recorded in the register of tailzies. But there was no such feudal right completed till within the years of prescription, the sasine upon the charter of adjudication having been expedite no earlier than 29th Dec. 1756, and the present action commenced 20th Nov. 1796. This also would be an objection to the positive prescription, to the effect of working off any of the limitations of the tailzie, but no such thing is pleaded by the defender, and there does not seem to be any room for it.

“ The negative prescription does not even commence so early as the date of that infestment, nothing having been done contrary to the tailzie; but, on the contrary, a step taken in implement of it. There was truly therefore a *non valentia agere*, or, which is the same thing, the action would have been nugatory and useless.”

LORD HERMAND —“ I think the whole right of action lost in this case.”

LORD MEADOWBANK.—“ I think the minority interrupts the prescription here.”

LORD CRAIG.—I doubt if there be any prescription pleadable.”

LORD CULLEN.—“ I am of opinion that the negative prescription has run against the obligation.”

LORD METHVEN.—“ There is no prescription run here.”

Lord President Campbell's Session Papers, vol. 97.

December 1799 and 27th May 1800, in so far as they do not sustain the defence of prescription against the whole accounting, and the respondents, in due time, presented their cross appeal against the interlocutors of 17th December 1799, which refused to order production of the Sederunt Book, and against the interlocutors of 18th December 1799 and 27th May 1800, in so far as prescription was thereby sustained to any extent.

1805.

ROCHEID

v.

KINLOCH, &c.

“ To explain this case to your Lordships, I must begin with stating the deed executed by Mrs. Elizabeth Rocheid in 14th January 1749. The first part of this deed contained a strict entail of certain shares which she had of an estate in Scotland, in which the appellant's father, Alexander Kinloch, was named first institute. In the next place, she conveyed her money, houses, and other property, to Alexander Kinloch, and the other heirs of tailzie and provision mentioned in the first part of the deed, with this proviso. (Here his Lordship read the whole of the proviso contained in this deed, stated in the appellant's case, p. 2.)

“ In an infetment of this kind, in this country, no doubt the person first mentioned would take the whole trust property ; but he would hold the whole as a trustee, and every time he transacted as to any part of the trust property, he would be held as acknowledging the trust *in the whole*.

“ By the law of Scotland, tailzies, with prohibitory, irritant, and resolutive clauses, are so guarded as to be almost impossible to break them ; but if not expressly so guarded, nothing is prohibited by implication. The question that arises here is, in my opinion, very little like any that has hitherto been decided upon entails ; it is an attempt to place in the hands of a Scotch executor, for his own private use, a sum of money, directed to be laid out in lands, to be settled under a tailzie. As far as this case has been discussed in the Court of Session, it appears to have been discussed with little reference to what the law of that country may furnish with regard to trusts, or what might have been furnished by analogy from the law of this country.

“ Instead of treating this question directly, as one of trust, they go into the law of prescription, and they say Mr. Rocheid's character of executor enabled him to take the funds into his hands, and that the substitutes had a claim against him to have them laid out in terms of the deed ; but that, if he did not deal with these funds, so as to acknowledge a trust, the claim of the substitutes was cut off by prescription. The principle laid down in this interlocutor is, that as to every sum the respondents can prove that the appellant uplifted within the forty years, he was bound to account, but that he was not bound to show, by the production of his tutor's books, any account as to payments beyond the forty years, whether he did lay out the money in securities, in terms of this deed, or not. The effect therefore, on the whole is, that the Court has sustained the defence

1805.
 —————
 ROCHEID
 v.
 KINLOCH, &c,

of prescription generally, but if a right accrued to the claimants within the forty years, they have said that they had a right to an account as to such right so accruing, and have directed the Lord Ordinary to take such account.

“ It appears to an English lawyer extremely difficult to sustain all the parts of this judgment. It appears a most singular proposition, that if a large personal estate is given to be laid out in land, and a long period of time elapses in recovering the different items, and, till the whole is collected, no demand is made that any part of this should be cut off by the statute of limitations, and that the accounting should be confined to that uplifted within the forty years.

“ The view, therefore, which I have taken of the case, is to affirm those parts of the judgment which respect the accounting within the forty years. On the other branches of the cause several points occur, which to me seem of very great importance.

“ One of these is, Whether you are entitled to call for papers and books to see if the trust was admitted, and if the new securities did not bear in *græmio* an acknowledgment of this trust? The Court of Session has not formally and finally decided as to this, but only in *hoc statu* refused to order production. The judgment appears to me to be clearly right as to the items within the forty years; as to the other items, if the parties have a right to see the papers, it is impossible to say if the appellant shall be assoilzied from a general accounting or not. If I were to speak my own opinion on this, (which I should do with great reserve,) it appears to me that the party had a right to see the papers; but I wish this to be examined by those whose means of information on the law are better than mine.

“ If it be necessary to remit as to this, it will also be necessary that the Court have an opportunity of reviewing as to the general accounting.

“ I pass over, at present, those other very difficult and important questions, if the prescription ought or ought not to have been overruled; and if there are any grounds for discounting the years of minority? This point, of the deduction of the years of minority, has lately been much considered by your Lordships. I allude to the late case of Bargany, in which some of your Lordships' House, now no more, and others now absent, took much interest. It would ill become me to express my opinion here upon this point; and I never shall decide it till it comes before me directly decided by the Court below.”

His Lordship hereupon moved the remit to the Court of Session to review the different interlocutors under appeal.

It was ordered and adjudged, that so much of the interlocutor of the 18th Dec. 1799 as repels the defence of prescription pleaded by the defender, in so far as concerns the debts originally due by Mr. Baird of Newbyth

and the Earl of Home ; and the price received from the trustees for building the South Bridge for the house in Merlin's wynd ; and finds the defender liable to account, and apply these sums in terms of Mrs. Elizabeth Rocheid's settlement ; and so much of the interlocutor of the 27th May 1800, as remits to the Lord Ordinary to hear parties farther on the defence of prescription in so far as concerns the debt due by the Earl of Kinnoul, the price of the house in Craig's close, and also in so far as concerns any other debts in *pari casu*, reserving to Mr. Rocheid his objections as in the said interlocutors is mentioned, and with power to the said Lord Ordinary to determine therein as to him should seem just, be, and the same are hereby *affirmed* ; and it is further ordered that the cause be remitted back to the Court of Session to review their interlocutor of 17th Dec. 1799, and also to review as much of their interlocutor of 18th Dec. 1799 as sustains the defence of prescription pleaded by the defender against a general accounting, and so much of their interlocutor of the 27th May 1800 as adheres to their interlocutor reclaimed against, so far as such adherence sustains such defence against a general accounting, and to do what, upon such review of the said interlocutors of 18th Dec. 1799, and so much of the said interlocutors of 18th Dec. 1799 and the 27th May 1800, as shall to the said Court seem just.

1805.

ROCHEID
v.
KINLOCH, &c.

For Appellant, *Wm. Adam, Ad. Gillies.*

For Respondents, *C. Hope, John Clerk.*

Under this remit of the House of Lords, the Court of Session pronounced this interlocutor (1st March 1808), 'Sustain the defence of the negative prescription against the general accounting demanded by the pursuers, and adhere to their interlocutors, in so far as the same have been submitted to review, in terms of the order of the House of Lords.' And, on further argument, this judgment was adhered to. Fac. Coll. et M. App. 1, Prescription No. 7.

1805.

<p>_____</p> <p>CAMPBELL, &C. v. MACNAIR, &C.</p>	<p>JAMES CAMPBELL & Co., and Others, Creditors on the sequestrated estate of Campbell, Ruthven, and Lindsay, Merchants in Green- ock, - - - - -</p>	}	Appellants;
---	---	---	-------------

<p>JOHN MACNAIR, Agent for the Bank of Scot- land in Greenock, Trustee on the said se- questrated estate, and ALEXANDER LEAR- MONTH, Merchant in London, one of the Commissioners thereon, and THOMAS ALLAN, Banker in Edin., another Commissioner,</p>	}	Respondents.
---	---	--------------

House of Lords, 11th July 1805.

BANKRUPTCY — REMOVAL OF TRUSTEE AND COMMISSIONERS — MANAGEMENT—CONJUNCT AND CONFIDENT.—This was a petition and complaint presented to the Court, for the removal of a trustee, on the ground of gross mismanagement of the estate, and for the removal of the three commissioners, on the ground of personal objection as to one of them, and as to the other two, that they resided in Edinburgh, while the trustee, and the bankrupts and bankrupt estate were resident in Greenock. (1.) Held that no sufficient evidence had as yet been adduced to authorize the removal of the trustee, or Mr. Learmonth, the commissioner first alluded to. (2.) But that the two other commissioners were not duly chosen, in respect they did not reside in Greenock, where the business must be chiefly conducted, and where the trustee himself resided. The first question was alone appealed to the House of Lords, and the case was remitted for re-consideration, with considerable doubts expressed as to the judgment of the Court of Session, and special directions as to the points to be reviewed.

This was a petition and complaint to the Court, presented by creditors for removal of the respondents, as trustee and commissioners on the sequestrated estate of Campbell, Ruthven, and Lindsay, West India merchants in Greenock, in the following circumstances:—

The bankrupts were West India merchants in Greenock, having estates in the West Indies, and also in possession of several vessels to carry on their extensive trade.

The company of Learmonth and Lindsay, merchants in London, were agents and brokers for the company of Campbell, Ruthven, and Lindsay in London, and, in this capacity, had made advances for, and became their creditors to the extent of £50,000.

In 1801, it was stated that this was the amount of their debt against the company of Campbell, Ruthven, and Lindsay, when the following mode of transaction was proposed by them. Learmonth and Lindsay directed their debtors to draw bills on them, payable in London, at two or three or four months date, and to discount these bills, and remit the proceeds to Learmonth and Lindsay; and, when these bills became due, to provide for them by drawing other bills, and discounting these in Scotland, and remitting the proceeds in the same manner.

1805.

CAMPBELL, &C.
v.
M'NAIR, &C.

Robert Allan and Son, bankers in Edinburgh, were the one brother in law, and the other nephew to Learmonth; and, in order to facilitate these bill transactions, which were bills for the accommodation of Learmonth and Lindsay, he introduced Campbell, Ruthven, and Lindsay, to these gentlemen as bankers, and it was arranged that these bills should be transmitted for discount to Allan and Son, that they might discount and remit the proceeds to London. It was alleged, that many bills so remitted were never discounted, nor the proceeds transmitted, although this was pretended to be done. The object by this transaction was, to keep the large capital of £50,000 constantly afloat by accommodation bills, which in the end was ruinous to the bankrupts. Thus, when a bill was drawn at Greenock, and transmitted to Messrs. Allan, they charged, in the first place, the whole interest from the date of receiving that bill to the day it became payable in London. 2d, They charged a half per cent. upon the whole amount of the bill. 3d, They charged one half per cent. for a bill on London to be remitted to Learmonth and Lindsay for the proceeds, payable at three days sight. 4th. They charged the stamp for that bill. 5th, They carried the transaction into a general account, upon the gross amount of which they charged a quarter per cent. 6th, On this bill Messrs. Learmonth and Lindsay, on their own account, charged the interest from the time of its being presented for acceptance until it was paid; and, 7th, They charged one half per cent. upon the amount of it. Thus the debtors were constantly paying at the rate of 16 or 18 per cent. upon the whole sum kept afloat, by which means the debt was increased in a few years to £60,000.

Mr. Learmonth foreseeing that this mode of transaction must ultimately ruin the company of Campbell, Ruthven, and Lindsay, came to Greenock, looked into the whole concerns of the company, took the chief management himself for eighteen months, and, perceiving distinctly that bank-

1805. ruptcy was inevitable, he persuaded the company to grant
 him absolute conveyances to all their heritable property which
 CAMPBELL, &c. they possessed, and also all the ships belonging to them,
 v. and thus obtained preferences to the amount of £20,000 or
 M'NAIR, &c. £30,000, to secure their large usurious debt.

It was stated, that Learmonth had desired after the trade
 of Campbell, Ruthven, and Co., and wished to supplant
 them in it; and, with that view, soon after he got his firm
 so far secured for their debt, he proposed to Campbell a
 trust deed for behoof of his creditors, in which he was to be
 vested as trustee for these creditors with the whole estate,
 and to carry on the West India trade, but this the company
 refused; and, upon threats of Learmonth and Lindsay, they
 thought it proper to apply for sequestration of their estates,
 July 4, 1804. of this date.

Learmonth then endeavoured to get the management of
 the bankrupt estate into his own hands, and those con-
 nected with him in those transactions. He was appointed
 interim factor. He was anxious to get himself appointed trustee;
 but ultimately, Mr. Buchanan (who refused to accept
 and resigned) and Mr. M'Nair, were elected trustees, Mr.
 Learmonth and Mr. Allan becoming their sureties. There-
 after, Mr. Learmonth, Mr. Allan, and Mr. Haig, were ap-
 pointed commissioners. These appointments were opposed,
 on the ground that these persons having an interest adverse
 to the other creditors, were incapable of judging impartially
 of those legal questions, which their own transactions with
 the bankrupts, immediately before the bankruptcy, made it
 necessary to investigate, but this opposition was unsuccessful.

It appearing to the creditors, from various transactions,
 that the whole management of the bankrupt estate was de-
 legated on Mr. Learmonth, and that the creditors had
 little hope of obtaining the illegal preferences and large
 usurious debt of Learmonth and Lindsay reduced, they were
 under the necessity of praying the Court to remove the
 trustee and commissioners from their respective offices. The
 objections against Mr. Learmonth were, that he was ineligi-
 ble to this office, as being conjunct and confident with the
 bankrupts; that he was unfit for the management, in respect
 of the nature of the claims reared up for Learmonth and
 Lindsay, and Allan and Son, and in respect of the fraudulent
 preferences he had obtained immediately before the bank-
 ruptcy. In addition, it was objected to Mr. Allan and Mr.
 Haig's appointment as commissioners, that they resided in
 Edinburgh and not in Greenock, and could not superintend

the actings of the trustee. In regard to the removal of the trustee, they averred that his appointment had been obtained by corrupt means—that he had abandoned the management of the estate to Mr. Learmonth,—that he had fraudulently disposed of monies belonging to the estate, instead of placing them in bank for general distribution, in terms of the statute. The respondents answered the complaint separately, in which they denied the facts, and maintained there was no fraud, and no legal ground for authorizing the Court for interfering.

1805.

CAMPBELL, &c.
v.
M'NAIR, &c.

Mr. Learmonth had been interim factor; and it appeared that, after the appointment of the trustee, he had disposed of sugars belonging to the bankrupt estate, amounting to £3072, at a disadvantage, and had taken bills for the price, and discounted them with Mr. M'Nair's bank. The answer to this was, that this step was necessary, in order to pay off certain claims on the bankrupt estate, which could not stand over.

The Court pronounced this interlocutor:—"Find no sufficient cause yet shown for removing John M'Nair from the office of trustee, which he at present holds, in consequence of having been elected by a majority of the creditors, in terms of the statute. They also find, that no sufficient cause has yet been shown for discontinuing Alexander Learmonth, who was chosen by the same majority, as one of the commissioners: Find, That Thomas Allan and James Haig were not duly chosen, as the other two commissioners, in respect that they do not reside in the town of Greenock, where the business must be chiefly conducted, and where the trustee himself resides; and, before further answer, allow the complainers, on or before Tuesday next, to put in a condescendence, in terms of the act of sederunt, specifying the charges which they mean still to insist on against the said John M'Nair and the said Alexander Learmonth, or either of them, and the mode of proof by which they propose to substantiate the same. And, lastly, appoint a meeting of the creditors to be held at Greenock, upon the 15th day of March next, in order to name two commissioners, in place of Thomas Allan and James Haig; and, in the meantime, ordain John M'Nair to proceed, as trustee in the execution of his office, in terms of the act of Parliament, without any advice or interference of commissioners, until the said nomination of new commissioners, in place of the two who have been found disqualified, shall take place."

1805. On reclaiming petition, along with the condescendence
 ————— ordered to be given in, and also a petition to interdict John
 CAMPBELL, &c. M'Nair from selling the heritable property belonging to the
 v. bankrupts, the Court pronounced this interlocutor:—"Of
 M'NAIR, &c. Mar. 7, 1805. "new ordain, and hereby authorize the said John M'Nair to
 "proceed in the meantime as trustee in the execution of
 "his office, in terms of the act of Parliament, in manner
 "mentioned in the interlocutor reclaimed against, and in so
 "far refuse the desire of these petitions, but *quoad ultra*
 "appoint answers to be given in to said two petitions and
 "condescendence, the same to be printed and boxed."
 Against these interlocutors the present appeal was brought
 to the House of Lords.

Pleaded for the Appellants.—1. The Lord Ordinary ought not to have confirmed the election of John M'Nair, because, by the statute 33 Geo. III. c. 74, a conjunct or confident person with the bankrupt is ineligible to the office of trustee or commissioner; and John M'Nair having corruptly bargained and agreed with Mr. Learmonth, a person conjunct and confident with the bankrupts, to possess himself of the office of trustee, with the view of devolving the management on him, whereby Mr. Learmonth might the better serve his own interests on the estate, his election ought not to have been confirmed. 2. The Court ought to remove him, because of his devolving the management of the estate on Learmonth; of his allowing Learmonth to appropriate large sums to his own purposes, in place of lodging these in bank, and because of his having acted as Learmonth and Lindsay's agent, in procuring for them preferences, to the prejudice of the trust estate. 3. The Court ought, in these circumstances, to have appointed an interim manager, and ordered a meeting of creditors to appoint a new trustee and commissioners, and to have found, that those creditors, whose debts had been objected to upon specific grounds, and who had an obvious interest to introduce a system of management hostile to the general interest of the trust estate, should have no vote at such meeting. 4. At least, the Court ought not to have authorized M'Nair to proceed without the advice or interference of the commissioners, because the doing so, in this case, was conferring powers upon the trustee not authorized by, but in express contradiction to the statute—powers which ought, in no case, to be conferred on a trustee, especially where his conduct is arraigned by so large and respectable a body of creditors offering to prove their averments *instantly* by the

most unexceptionable evidence. 5. Because the Court of Session have an inherent right to interpose their authority for the ends of justice in such cases, though not specially provided for by the statute or common law; and therefore ought, in this case, either to have nominated a proper person to the office of trustee, or to have appointed the creditors to meet and choose a trustee, and it is competent to the Court, and in accordance with former practice, so to regulate the matter.

1803.

CAMPBELL, & C.
v.
M'NAIR, & C.

Pleaded for the Respondent M'Nair.—The bankrupt statute having declared the right of election to be in the majority in value of the creditors, the Court have no power, either to name a trustee or to disqualify any of the creditors who had proved their debts, from voting. By the statute, 33 Geo. III. c. 74, (and 39 Geo. III. c. 53, and 43 Geo. III. c. 24), § 20, it is enacted, that, at the meeting for electing the trustee “the majority of creditors in value or extent of debt present at the meeting shall determine who is to be trustee.” And by sec. 59, it is enacted, “that it shall be competent at any time for one-fourth of the creditors in value to apply summarily to the Court of Session for having him removed, upon cause shown; a majority of creditors in value, at any meeting to be advertised for the purpose, shall likewise be entitled to remove and accept of the resignation of any trustee.” These are the only provisions of the act with respect to the appointment and removal of the trustee; and as the respondent has been duly elected, and the appellants do not amount to one-fourth of the creditors in value, it is not competent to them to apply for his removal. 2. The grounds upon which the appellants rest their application for removal of the trustee consist entirely of allegations of mismanagement, and converting the trust funds to his own use, or permitting Mr. Learmonth to receive and appropriate the same to the prejudice of the appellants. On the supposition that all this were true, which assuredly it is not, the particular procedure applicable to such case is also laid down in sec. 59 of the bankrupt act, which declares, “that the interim manager, and likewise trustee, shall, at all times, be amenable to the Court of Session, by summary application to that Court, to account for his intromissions and management, and answer for his conduct, at the instance of any party interested.” By which it is plainly seen that the appellants, who do not amount to one-fourth of the creditors, may oblige the trustee to render an account of intromissions to that Court, when, if he shall be found to

1805. have misapplied the funds, he may be made liable for the loss; and as the trustee has found ample security to the extent of £10,000, nearly to the full amount of the whole debts due the appellants, and is quite willing to account, there seem no grounds for removing him from the office.

CAMPBELL, & C.
v.
M'NAIR, & C.

Pleaded for Mr. Learmonth.—In regard to Mr. Learmonth, the same objection to the competency of the interference of the Court applies. He has been duly elected to the office of commissioner by a majority of the creditors in value, as directed by sec. 28 of the act; and no power is given by the said act to remove a commissioner who has been duly elected. Even if it were competent so to remove him, there were no grounds in fact, for so doing.

After hearing counsel,

LORD CHANCELLOR ELDON said, *—

“ My Lords,

“ This appeal of Campbell and Others v. John M'Nair and Alexander Learmonth, is a case of very great importance, and your Lordships are, for the first time, called upon to consider the proceedings of the Court of Session in Scotland—proceedings as they term them—by sequestration of the bankrupts' estates. My Lords, the case which has been submitted to your Lordships' consideration, and the topics urged, I can venture, upon my experience, to state to your Lordships, would not have consumed a quarter of an hour in the Court of Chancery in this part of the Island, with reference to the question, Whether certain individuals (one of whom has been chosen a trustee, and the other a commissioner, of the sequestrated estates), should continue with the characters that belong to a trustee; the commissioner being, as well as the trustee, a trustee for all the creditors, and who ought therefore to be capable, and clearly capable, beyond all suspicion, of acting with indifference, liberality, and impartiality, to all the creditors? It has been laid down here, for a considerable time, as a clear rule, if a person is elected to the situation of assignee, who has an interest beyond that which belongs to him as an ordinary creditor under the commission, that is to say, if he possessed himself by conveyance, where the conveyance is not perhaps effectually questionable, but reasonably questionable, by taking pledges of real property, and possessing himself of personal property, by being much engaged in complicated transactions with the bankrupt, which should be examined, such a creditor, being clothed with the character of assignee, is thought to be invested with a character which enables him to discuss those questions, with reference to the other creditors, with great and undue advantage to himself. He must act as trustee to the body of the creditors completely in every transaction relative to the bankrupt's estate; and, on

* From Mr. Gurney's short-hand notes.

the other hand, as an individual interested for himself, defending his own transactions with himself, and bound not to impeach, but to support his own character as assignee. The Court, therefore, does not trouble itself to inquire into the question, Whether there has been any actual misconduct after he has been elected into the situation of assignee or trustee? But it says, and says upon general principles, that he has an interest to support, which is likely, undoubtedly, to influence and bias him against the general body of creditors. And though the act gives a certain number and value of the creditors to elect whom they will, the construction of that act has been, that, in making that election, they are, nevertheless, upon general principles, bound to elect some person who will be as indifferent in respect to himself, as he will be to all the other creditors; and, if he has an adverse interest to support, the fact of his having an adverse interest to support, is thought sufficient to call upon the Court to declare, that within the intention and meaning of the act, he is a person not capable of being elected to that trust. My Lords, we have gone farther than that, because, in respect to the misconduct of an assignee, we hold most clearly, that when we remove him, he shall not be permitted to vote in the choice of another trustee: and your Lordships will see, upon the same principle, that it could not be within the meaning of the act, when it enabled the creditor to vote in the choice, to give such a creditor a power, whose vote in the election *would annihilate all choice*; and if the ground of removing an assignee is, that he has misconducted himself, or that he is in the situation in which the law will suppose, from general incidents, (perhaps supposed incorrectly), with regard to the individual, that he has not acted with the same evenness towards others as he would act towards himself, then, in removing him, they take care to protect the general body from a careless assignee, and against the influence of his vote in the choice of another assignee; because, if his vote determines, and if the *quantum* of his debt will enable him to choose another who is his creature, it is exactly the same thing as if he was assignee himself. In this case, therefore, without examining at present whether similar objections were stated against the other creditors, as are here stated against Learmonth, who is chosen a commissioner, without entering into the question, Whether similar objections may be applied to the other creditors, it would be enough to say, there is no further complaint before the Court alleging the other creditors have any interest?

“My Lords, it has been contended at your bar, that, according to the true intent and meaning of the act relating to sequestration, that if a person is appointed the trustee,—if he is chosen a trustee by a majority of creditors in terms of the act, that in that office in which he is thus placed he must remain, and, therefore, upon general principles, it is contended, that the Court of Session cannot remove him.

“My Lords, it does not appear to me that *that* point, which has been argued at your bar, has ever been distinctly before the Court of Session, nor does it appear to me a *fortiori*, that the judges have

1805.

 CAMPBELL, & C.
 v.
 M'NAIR, & C.

1805
 ———
 CAMPBELL, &C.
 v.
 M'NAIR, &C.

been called upon to consider that point ; but regard being had to the decisions in this part of the island, which have been pronounced upon statutes almost in *pari materia*, and almost where the express words of the statute have been controlled by that construction—and regard being had to what has been supposed to be the intent and meaning of the legislature, aiming at giving some person the control over the property to be divided, who would be indifferent as between himself and the other creditors. With reference to this, it has been insisted, that there is an express clause in one of the statutes, that a certain number of creditors must concur in applying to the Court, in order to have a trustee removed. I should entertain a doubt, however, whether that clause can be taken to be a clause destructive of the attempt to construe those acts of Parliament upon general principles, with reference to the question, who is capable of electing or being elected a trustee, or whether, on the other hand, that clause may not be satisfied, by supposing it applies to the case of the election of persons duly nominated, against whom no general principle militates, but afterwards is a person fit to be removed.

“ My Lords, the appeal is brought before your Lordships upon the misconduct, and upon the gross misconduct as it is alleged, observed by the commissioner and trustee since their appointment ; and it appears to me that the Court of Session have not decided the question at all, if I understand their proceedings, whether the fraudulent conduct so alleged, and that gross misconduct so alleged, has existed in fact, much less have they decided, if it has, that a trustee cannot be removed ; but they have ordered the parties to condescend upon the facts, and they have given them leave to go into proof of the facts. There can be no principle upon which the Court could have taken that course, unless they thought, notwithstanding the terms of the act, that they have a power to remove a trustee or commissioner who was guilty of such misconduct. All that the Court appears to me to have done is this, namely, to call upon the party to state the facts, which they say are the facts that make out the allegation of fraud and misconduct, and to allow the proof upon those facts, and they allege they do this according to their act of Sederunt, which your Lordships will recollect, according to the statute, they have a power, legislatively as it were, to pass, for the purpose of supplying the defects of all those acts of Parliament, and adding such relief as is necessary. According to that act, therefore, they have taken this course, and having taken this course according to the act of Sederunt, it is difficult to say, however inconvenient, and however much it may press upon the proper and prompt distribution of the sequestrated estate, it will be difficult to say, that until the proof is given of the facts that are to constitute the fraud alleged, and until the Court shall see that proof, whether it is proper to interfere. It may not be, that they have not taken the most expedient course, though it is a course that may be quarrelled with by way of appeal ; and I entertain a strong doubt, whether, according to the proceedings of the Court of Session in Scotland, this appeal brings before

your Lordships a case on which you have the power of determining, what I think is one of the most important questions in this cause, and the question which the Court of Session must sooner or later be called upon distinctly to determine, whether the circumstance of a trustee having an interest adverse to the interest of the body of the creditors, necessarily disqualified him from being originally elected a trustee, or from voting as a trustee or commissioner; and I doubt a great deal, on looking into these proceedings, whether your Lordships can look at them at present as opening to any other questions. Questions, respecting whether subsequent misconduct is a ground for seeking to remove those parties. The appointments have been confirmed, and it will be difficult to struggle with it; but I wish to open the means of doing it, whether the confirmation of the original appointments does or does not shut out the discussion of the great question I have been alluding to,—namely, Whether that adverse interest does not incapacitate those parties to be chosen to those offices they have been elected to? I shall therefore move that this cause be referred back to the Court of Session, with special directions open to all these considerations, and which, if those considerations, according to the form of the proceedings of that Court, be not open, will not delay the decision of the Court, and if they are open, it will call upon the Court to give this great point due consideration; and if they should be of opinion they may exercise the same sort of construction that we do over our bankrupt acts, they would decide this question upon the leading point, without entangling themselves with all the difficulty and delay that belongs to going into proof, before they can come to judgment.

1805.

CAMPBELL, &c.

v.
M'NAIR, &c.

“ My Lords, it has been a little difficult to pen such a judgment as I shall advise your Lordships to accede to, in order that the ends at which your Lordships aim may be attained; I move, therefore, to remit the cause back to the Court of Session, and in case that Court shall be of opinion, due regard being had, &c.

(Here the Lord Chancellor read a part of his judgment.)

“ Your Lordships will see that the last words I have said will embrace another point which has been agitated, that is, what is the amount of the debt Learmonth has proved? Your Lordships know, in this part of the island, when a man goes as a creditor to prove a debt for a bill, the mere words of the act are, that he is entitled to prove the real amount of the debts he is to swear to; but, on the other hand, if he has property, you will not let him give in any proof at all, unless he will give up that property before he votes, applying the sale of the property he so takes, and then reducing the debt by the amount of the property so sold, and if he chooses to have the benefit of that, he does not rank as a creditor in any proceedings; these words, therefore, will comprehend that point as arising out of the act. In order to call the attention of the Court to the leading principles, with a view not only in this case, but in future cases that may arise, to give an intimation of the principles upon which we proceed,

1805. I should advise your Lordships to proceed thus:—"But if the Court shall be of opinion," &c.
 CAMPBELL, &c. (Here the Lord Chancellor read the remainder of his judgment.)
 v.
 M'NAIR, &c. "Meaning to say, that if, according to the forms of proceeding of the Court of Session, the time is gone by when the original appointments could be objected to, and the time is now come, when the question about removing those persons, must be a question upon their subsequent conduct, and not upon the capacity, that, in that case, the interlocutor should be affirmed; because, in that case, the ground of removing them, with regard to such subsequent conduct, must be alleged and proved. It appears, therefore, that this way of putting the case will open those questions to discussion, if their forms of proceeding will permit them to be opened; and if those forms will not permit, then to decide that the interlocutor ought not to be reversed. Thus, opportunity will be given to review the interlocutor, with regard to the particulars, as well as with regard to the particular facts alleged, upon which proof has been proposed."

It was ordered and adjudged that the cause be remitted back to the Court of Session in Scotland, and in case that Court shall be of opinion that it is not now competent for the appellants to call in question the original appointment of John M'Nair and Alexander Learmonth, or either of them, in that case, the several interlocutors therein complained of be affirmed; and it is further ordered and adjudged, that if the Court shall be of opinion that it is now competent for the appellants so to proceed, then that said Court, in such case, do review the several interlocutors complained of; and also hear the parties upon the question, whether the respondent, Alexander Learmonth, hath or hath not been ranked and voted as a creditor for a larger sum than he ought to have been ranked, and as to the effect of such fact, if such hath been the fact, and that the Court do hear the parties, in that case also, upon the question how far it is or not by law competent for the Court, at the instance of one or more creditors, to remove from the office of commissioner, or trustee of a sequestrated estate, any creditor nominated a trustee or commissioner, or any person in effect elected to such offices respectively by the vote of a creditor, (whether fraud or misconduct can or cannot be proved against such creditor or person so elected), the legal effect of whose alleged transactions with the bankrupt estate, prior to the bankruptcy, however just as between such creditor and the bankrupt, may appear to be reasonably questionable, and such as fairly to require to be

settled by proceedings in law, or the judgment of 1805.
 persons altogether impartial, and which creditor may
 have considerable interests of his own to protect, or ^{CAMPBELL, &C.}
 cause to be protected, against the interests, and to the ^{v.} M'NAIR, &C.
 prejudice of the general body of creditors, (whose inter-
 rests, nevertheless, a trustee or commissioner of a
 sequestrated estate, it is contended, is bound to protect
 as his own) such interests leading to endeavour, as
 against them, to withdraw, or maintain himself in having
 withdrawn, from general distribution, for his own parti-
 cular benefit, parts of the bankrupt's estate, with refe-
 rence to which he may have had transactions with the
 bankrupts, before their bankruptcy, fairly questionable
 as to their validity by the other creditors, even if perfect-
 ly just as with respect to the bankrupts themselves,
 and whether, upon general principles, a person having,
 or claiming to have interests adverse to, and beyond
 those of the body of creditors, can be effectually cho-
 sen, or can, by the influence of the amount of his alleg-
 ed debt, in the choice, effectually cause to be chosen,
 the trustee or commissioner, who, as it may be alleged,
 ought to act on behalf of all the creditors with perfect
 indifference and impartiality; and in such case as afore-
 said, after the Court shall have reviewed the interlocu-
 tors, and heard the parties, the Court is further to
 proceed to do what shall appear to the Court to be just
 and according to law, as to removing or not removing
 the respondent, Alexander Learmonth, from the office
 of commissioner, and as to removing or not removing
 the respondent, John M'Nair, from the office of
 trustee; and as to restraining or not restraining, the
 respondent, Alexander Learmonth, from voting in the
 choice of a trustee or commissioner, and to do in all
 other respects as to all other matters complained of in
 the interlocutors appealed from, what shall appear to
 the said Court to be just.

For Appellants, *Sir Samuel Romilly, Henry Erskine, John Clerk.*

For Respondents, *Wm. Adam, W. Alexander.*

NOTE.—Unreported in the Court of Session.—In the case of *Furlong and Others v. M'Nair and Others*, (1st Feb. 1809, Fac. Coll. vol. xv. p. 142,) it is stated that the remit in this case was not applied, Learmonth having settled the cause, after the above judgment in the House of Lords, by purchasing up the debts of the creditors who opposed him.

1806.

WHITE, &c. v. STEWART.	WILLIAM WHYTE, Portioner in ABERNETHY, and ANNE SHARP, Daughter of James Sharp, Weaver in Newburgh, deceased, the original Appellant in this cause, JAMES STEWART, Carrier in Dunkeld,	} <i>Appellants ;</i> } - <i>Respondent.</i>
------------------------------	--	--

House of Lords, 28th Feb. 1806.

REDUCTION OF SERVICE—PROPINQUITY.—Circumstances in which a service set aside.

* This was a competition in regard to the succession of the deceased James Stewart, which rested chiefly on the facts adduced in proof, as to which of them was the nearest heir entitled to be served and to succeed to the deceased.

The service of the respondent, James Stwart, had been first expedo; and so left no room, it was contended, for a second service in name of James Sharp; but James Sharp also served himself heir, and mutual actions of reduction were brought by the parties against each other, to set aside
 Nov. 20, 1799. the one service as adverse to the other.

The Lords, of this date, pronounced this interlocutor:—
 “ Having advised this petition, with additional petition for
 “ James Stewart, and answers for James Sharp, sustain the
 “ reasons of reduction in the action brought by James
 “ Stewart; and reduce, decern, and declare accordingly;
 “ repel the reasons of reduction in James Sharp’s action,
 “ assoilzies James Stewart therefrom, and decern.”

The appellant preferred a reclaiming petition against this interlocutor, in which he admitted, that unless he could prove that he was the lawful heir of James Stewart, he could not challenge the respondent’s service. He also seemed to admit that the proof he had brought was not only inconsistent with his service, *the degree of relationship* being altogether different; that several important links of the chain had been altogether omitted, and no evidence brought that James Stewart, in the island of Lewis, or his son and daughter, said to be the connecting links between the ancestors of the appellant and James Stewart, ever existed. But it was maintained, that the Court might nevertheless warrantably decide in favour of the appellant, on two grounds; 1st, An alleged general opinion or reputation, during James Stewart’s life, and afterwards, that the appellant was his nearest and lawful heir; and, 2dly, The declarations of James Stewart himself

to the same effect. But, fully aware these arguments were quite untenable, he demanded a farther proof; and, by the permission of the Court, he put in a condescendence (of particulars) of the facts he expected to prove, and of the names and designations of the witnesses whom he meant to bring forward. But, besides the danger and novelty of admitting new and additional proofs, in a case so peculiarly situated, the circumstances appeared to be either immaterial to the issue, or such as the persons mentioned could not swear to from their proper knowledge. And answers having been put in to this petition, the Court refused to allow the petitioner a farther proof, and adhered to the interlocutor reclaimed against.

1806.

CARRON CO.
v.
OGILVIE.

Nov. 18, 1800.

Against these interlocutors James Sharp brought an appeal to the House of Lords, and, dying during its dependence, Anne Sharp, his daughter, carried it on.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

N. B.—No Appellant's case printed.

For Respondents.—*R. Craigie, J. P. Grant.*

NOTE.—Unreported in the Court of Session.

CARRON COMPANY,	- - - -	<i>Appellants;</i>
JOHN OGILVIE, Esq. of Gairdoch,	-	<i>Respondent.</i>

(*Et e contra.*)

House of Lords, 7th March 1806.

NAVIGABLE RIVERS—RIGHT OF TOWING OR TRACKING PATH—PRESCRIPTION—IMMEMORIAL USAGE—INTERRUPTION—ACQUIESCENCE—EXPENSE.—1. This was an interdict brought by the respondent, with a declarator brought by the appellants, to have it declared that the Carron, being a public navigable river, all His Majesty's lieges navigating this river, had a right to use the banks thereof, so far as necessary for the purpose of navigation, and that, past the memory of man, a tracking path had been used for towing the vessels on both sides of the Carron, and that mooring posts had been placed on these banks to serve the same purpose. The Court of Session, after proof taken, held that there was established a right of towing and tracking vessels on both banks of the Carron, with the exception of a part marked out, and which belonged to the respondent, as to which there seemed to have been

1806.
 CARRON CO.
 v.
 OGILVIE.

some interruption acquiesced in by the public. Held in the House of Lords, that the right of tracking on the north side of the river, where this excepted part lay, was as good as on the south. That there was a clear right of tracking on both sides, in point of law; but that the acquiescence of the parties may have shut them out from the part excepted. 2. That the appellants were entitled to have mooring posts on this part so excepted, and that they were not liable to bear any part of the expense in keeping up the sea dykes or mooring posts.

The Carron is a navigable river, and has from time immemorial been frequented by vessels of different sizes, employed in various branches of trade.

The land on both sides of the river is very low and flat; and used at an early period to be overflowed by the tide. These parts of the land so overflowed were called "Sea Greens;" and, in order to reclaim the good improveable ground of that part so covered, the proprietors, at a very remote period, erected seadykes, or mounds of earth, running along side of the river, so as to protect these lands from the tides, and to confine it within its channel.

The method of working vessels up and down the river was by tracking or towing; and these dykes, where such were erected, and where there were none, the banks along the river, had been used for time past the memory of man, by the people engaged in towing the vessels.

In process of time, other improvements were effected on the river, having in view to facilitate the navigation thereof. The great and many bends or windings of its course interposed obstacles and delays, to overcome which several cuts were made in a straight line,—thus cutting off the bends or windings, and at same time affording the proprietor an opportunity of turning the old bed or channel left dry into land fit for husbandry. The new banks and dykes on each side so formed by these cuttings, were used as formerly for tracking or towing the vessels up and down the Carron. And these tracking paths were used as common footpaths by every person, though not engaged in towing vessels up and down the river. Besides this, there was another right possessed from time immemorial, enjoyed on the same footing, viz. of mooring, and, for that purpose, of casting on shore anchors where there were no posts; but in some places there were permanent posts fixed into the sea dykes for this purpose.

The Carron Company, deeply interested in the navigation of the river, from the extensive trade carried on by them,

carried on their works further up the river than the respondent's property. Some years after they had erected their iron works, a shipping company was established by Francis Garbett and Co. at Carron Wharf. A large house was here built by them, part of which served as a dwelling house, and the rest of the building, which was extensive, consisted of warehouses, counting house, and other offices necessary for the concern. In front of the house there was a pier, and a crane erected thereon, for loading and unloading. In 1782 this shipping company failed, and the property and grounds were acquired by the respondent, Ogilvie.

1806.

CARRON CO.
v.
OGILVIE.

Having converted this house and warehouses into a mansion house, and occupying the same under the title of Carron House, he began to interfere with, and quarrel and interrupt the sailors in tracking their vessels along this part of the river. He cut down the mooring posts, and erected a high wall across the tracking path, running from the west end of his house into the water, to prevent any person passing that way. He afterwards brought a suspension and interdict, to prohibit all from invading the privacy of his grounds; whereupon the appellants brought an action of declarator to have it declared, that in this public river, by "the public law of the land, all his Majesty's lieges have the right of navigating rivers within his Majesty's territory, upon all occasions, and of using the banks of these rivers so far as may be necessary for the purpose of navigating the same; yet notwithstanding the right so vested in his Majesty's subjects, by the public law of the land, and that a tracking path has been used for tracking vessels along the banks of the river Carron, and that mooring poles have been placed upon the said banks past the memory of man, the said John Ogilvie, Esq. (respondent), proprietor of the ground upon the banks of the said river, has thought proper, at his own hand, without any form of law, to build a dike, and place railways across the tracking path upon his property, on the north bank of the river Carron, and to cut down the mooring poles thereon, by which the navigation of the Carron is much interrupted;" and therefore concluding that he had no right to erect these obstructions, and that the pursuers (appellants) and all others, navigating the said river Carron, had right to use the banks for towing or tracking their vessels, and to moor their vessels thereon, &c. In defence, it was pleaded, that a towing or tracking path was not an essential accessory of a

1806. navigable river; that, in the present case, it is unnecessary ;
 and as the defender purchased his estate without the burden
 of any servitude, he is not obliged to submit to such tracking
 path along his grouds, which, until these few years, was
 never used or heard of.

CARRON CO.
 v.
 OGILVIE.

Jan. 15 and
 18, 1798.

Feb. 5th and
 7th, 1800.

After proof of the immemorial usage, the Lord Ordinary reported the case to the Court, who pronounced an interlocutor, finding “ that the pursuers (appellants) have a right “ to track their vessels along *both banks* of the Carron,” on bearing a proportion of the expense of keeping up the dykes. Both parties reclaiming, the appellants only against bearing a proportion of keeping up the defender’s sea dykes, the Court pronounced this interlocutor :—“ Find that the “ pursuers have a right of tracking on the whole south side “ of the river, so far as the defender’s property on that “ side extends: Finds that although a usage has also been “ proved of tracking occasionally by men landed from vessels on the north side of the river, yet as the same is not “ essential to the navigation, and has, at times, and in different places, been obstructed by the state of the bank on “ that side, and by alterations on the bank which may have “ been acquiesced in, the pursuers are not at liberty to track “ *over the whole* of the said north side ; but of tracking by “ men, on that side, from the east corner of the square “ building marked on the plan, where the pitch house formerly stood, downward to the eastern mark of the defender’s property, and in so far remove the interdict ; but “ find that they are not at liberty to track on that space “ which is interjected between the east corner of the said “ square building where the pitch house formerly stood, and “ the old boundary of the defender’s property to the west “ of his mansion house, and in so far continue the interdict : “ Find that, in so far as the pursuers make use of the sea “ dykes, for the purpose of tracking, they must pay any “ damage thereby occasioned to the dykes: Find that the “ pursuers may fix mooring posts at convenient places on “ either side of the river, as near the brink of the river as is “ consistent with their being firm ; they being answerable “ for all damage thereby occasioned to the sea dykes, or “ otherwise ; and with this exception, that there are to be “ no such posts on the north side, between the upper end “ of the sea dyke near the pitch house, and the old march “ aforesaid, to the west of the defender’s house ; and remit “ to Lord Balmuto to proceed accordingly.” On reclaiming

petition from both parties, the Court superseded consideration of the prayer of the appellants' petition, in so far as it prayed to find them entitled to place mooring posts upon every part of the north bank; and *quoad ultra* adhered. The respondent's petition prayed to alter the interlocutor, and to find, 1st, That the pursuers had no right to track upon any part of the north bank, upon the petitioner's property. 2d, To find that they have no right to track upon the petitioner's sea dykes; and, 3d, No right to place mooring posts, except those which are proved to have been placed and used beyond the years of prescription. But the Court refused as to the first prayer, and *quoad ultra* ordered answers. Upon consideration of which they adhered.

1806.
CARRON CO.
v.
OGILVIE.
Mar. 4, 1800.

June 24, 1800.

On the last petition from the respondent, the Court, of same date, refused "the desire of the petition, in so far as it prays the Court to find that the pursuers have no right to track upon the sea dykes, and adhere to their interlocutor thereby reclaimed against; and before answer *quoad ultra*, remit to the Sheriff-depute of the county of Stirling, after proper inquiry at persons acquainted with the navigation of the river, and other persons of skill, to report the number of mooring posts necessary for the navigation of the river, and the places where they ought to be fixed."

Upon advising this report, the Court found that certain mooring posts were necessary for the navigation of the river, and within the defender's property, both on the north and south side of the same, at places marked out and specified.

Against these interlocutors the appellants brought an appeal, in so far as it was found that they had no right to track their vessels on that space of the defender's property which is interjected between the east corner of the square building where the pitch house formerly stood, and the old boundary of the defender's property to the west of the mansion house, and also in so far as it makes them liable in any damage to the sea dykes, in using them for the purpose of tracking, and also in any damage occasioned by mooring poles; and also in placing such poles at any place along the banks of the river, in so far as restricted. The respondent brought a cross appeal against these interlocutors, praying that the appellants have no right of tracking on any part of his property, nor of placing mooring poles thereon.

Pleaded for the Appellants.—In point of fact, it is established by the evidence, that from time immemorial there

1806.
CARRON CO.
v.
OGILVIE.

has been a public, general, and very considerable trade carried on in the river Carron, as far up as the Carron shore belonging to the appellants, and which is past the respondent's property. That, as necessary to this trade, and the navigation of the river, there has been, from time immemorial, an uninterrupted practice of tracking on both banks of the river, and also the right of mooring the vessels at fixed posts on the sea dykes along the banks, so as to establish a prescriptive right on the part of the public. But, in point of law, this river Carron being a public navigable river—a *juris publici*, the lieges have, at common law, a right to use the banks of all such navigable rivers, for all necessary purposes of navigation, just as they have a right to use the sea shore; and therefore the appellants have a right to track along the banks of this navigable river, which tracking is necessary, from the peculiar nature of this river, in its many windings, to the navigation. It is truly a creek or arm of the sea, the tide going much further up than the respondent's property. The tracking, therefore, as well as the placing of mooring poles on the banks, are rights beyond dispute; and the interlocutor of the Court, in so far as it restrained the appellants from tracking and placing mooring poles on the north bank of the river, ought to be altered.

Pleaded for the Respondent.—The right of tracking is not an essential accessory to the navigation of a public river, and therefore such right of tracking and fixing mooring posts upon the banks of any navigable river, does not exist as a common law right. The appellants have not otherwise established a prescriptive right of tracking on the banks of the river Carron, by the evidence adduced; and even if such right of servitude were established as a servitude, it would be still subject to regulation in a way the least burdensome to the servient tenement; and tracking, which is a right of servitude, is not necessary on both banks of the river. And, if allowed at all, it must be confined to the mere banks, and cannot extend to the sea dykes, which are at some distance from the bed of the river, leaving between them and such bed, ground upon which it is possible to track, and where it might be performed with less injury to the owner than upon the sea dykes. And further, the appellants have no right, either at common law, or by prescription, to fix mooring posts on the banks of the river, except where they are proved to have existed upwards of forty years before the commencement of this action.

After hearing counsel,

The LORD CHANCELLOR ELDON said,—

“ My Lords,

“ This is a case of an appeal and cross appeal, from the Court of Session, in regard to a towing path along the banks of the Carron. It appears to me, that this was a case which was very fit to be settled by compromise, and it was delayed accordingly with that view ; but as, after the lapse of a considerable length of time, there seems to be no hope of this, it is necessary, in justice to both parties, to give decision on the matters arising from both appeals.

“ There are many interlocutors in the present cause ; it is my purpose, at present, to state them briefly, with the circumstances of the case, to explain the principles which influence my mind, in forming the judgment which I shall submit to you ; and to move an adjournment till Friday, when I shall lay the words of that judgment before you.

“ To make this case intelligible at present, I shall state its circumstances shortly. It is alleged by the Carron Company, that a right of navigating the river Carron, and of the use of its banks for the navigation, and for fixing mooring posts, is created by the common law of Scotland. Without entering into this, it is quite clear, in my apprehension, that this river has been a navigable river ; that its banks have been used as tracking paths, and that a right of using mooring posts in it has existed for a great number of years, much beyond the years of the long prescription, and past the memory of man.

“ From a plan exhibited of the former and present state of the river, the course of it appears to have been altered, by making shorter cuts in different parts of it ; part of the grounds on its banks, overflowed at high tides, was protected by sea dykes as they are termed—and thus the conterminous heritors made additions to their properties. Part of these improvements was made before Mr. Ogilvie's time ; part since he acquired the estate situate on the banks of this river. Before his time, considerable interruption had been created to the tracking, at one part of the river, by the buildings and erections at the Carron Wharf.

“ Mr. Ogilvie became proprietor of the estate in 1783 ; and he, as the appellants allege, began to make very considerable improvements upon it, which were encroachments upon the right of tracking. Then a forcible removal took place of some of the impediments ; and Mr. Ogilvie brought a complaint against the shipmasters concerned in doing so, before the Justices of the Peace of the county, for destroying his plantings and inclosures, under an act of the parliament of Scotland.

“ A bill of advocacy carried this matter before the Court of Session. Mr. Ogilvie then presented a bill of suspension and interdict, and obtained a temporary prohibition against landing or tracking on the north side of the river.

1806.

CARRON CO.
v.
OGILVIE.

1806.
 CARRON CO.
 v.
 OGILVIE.

" The appellants, and certain of the shipmasters, then raised declarators against Mr. Ogilvie before the Court of Session, for ascertaining their rights in this matter. (Here his Lordship read the recital and conclusions of the appellants' summons, from page 2 and 3 of their appeal case.)

" Mr. Ogilvie, on the other hand, contended, that a towing path was not an essential accessory to a navigable river, and that, in the present case, it was unnecessary. The demand was of a towing or tracking path on both sides of the river, and, in the future proceedings of the most extensive litigation, the defence was restricted to this, that there was only a towing or tracking path on one side.

" It was a material allegation, which Mr. Ogilvie made in the commencement of the cause, that the tracking path had never been heard of till of late years. If this were so, the appellants would have been obliged to make out their right at common law ; and that such right was not lost by non-use or prescription. On the other hand, I cannot imagine how it could be made out, that a towing path was not necessary. The question appears to turn wholly on the custom and usage.

" I am sorry to have observed, in this case, a strong appearance of the parties amusing themselves by unnecessary expense. They have taken the trouble of inquiring what was the usage of tracking, not only on the navigable rivers and canals of Scotland, but on those of other countries. I believe it may be asserted, that there are few rivers where a right of tracking on both sides exists ; but if such is used, it cannot be shut out on any ground of the want of necessity. The state of the river Carron is such, that it is convenient to track on both sides of the river ; but I do not inquire into the matter of convenience ; the sole question is, How the tracking has been practised *de facto* ?

" In a condescendence of facts given in by the appellants, they insisted upon the exercise of the right of tracking on both sides of the river, and also upon the necessity of this, that mooring poles had been used for many years, till they were cut down by the defender ; that the river Carron had been long navigable for ships from 60 to 100 tons burden ; and they stated the circumstances that had led to the building of Carron Wharf, and the defender's house, which had given interruption to the exercise of the right of tracking.

The defender gave in a condescendence upon his part ; and contended that no proof was necessary of the usage of tracking, on account of the interruption given thereto and acquiesced in ; but this opposition was ineffectual, and a proof was allowed.

" The Court then pronounced the interlocutor 15th Dec. 1798." (His Lordship read the same, and mentioned that it was appealed from on both sides.) " I might call your particular attention to part of this interlocutor, finding that the pursuers must bear a proportion of the expense of keeping ' up the defender's sea dykes used by them

' as tracking paths ;' this is one point made in the appeal of the Carron Company.

1800.

" In looking through the notes of the judges' opinions, which have been handed to us, I cannot find that counsel have ever been heard upon this point. There was a difference of opinion among the judges, whether a hearing upon this should take place or not ; but the majority of the judges, without hearing an argument upon the point, were of opinion expressed in this interlocutor.

CARRON CO.
v.
OGILVIE.

" Upon this, I am free to deliver my opinion, that if the Carron Company have established a right of tracking on both sides of the river, as I think they have clearly done, I cannot imagine on what ground it is, that those using the sea dykes are obliged to maintain them. In Scotland, the owner of the dominant tenement is not liable in expenses to the owner of the servient tenement : those who possess the lower apartments of large houses are obliged to keep them up to support the upper apartments.

" Let us see what the case was here, the right of tracking was clearly established before the erection of the sea banks ; and this right of tracking must have been upon the banks as they naturally were. Those using the right of tracking could not call upon the owners of the adjacent lands to put the banks of the river into better order than they were by nature. If these owners, to improve their lands, choose to build dykes, the act of tracking on those dykes arose from the act of the owners of the lands. If these owners had left room for the tracking path this might have been different. But why call upon the tracker to pay any part of the expense which was to be applied to a purpose totally different ? In the present case, he was obliged to go upon the sea banks ; he could not be compelled to track in the river, nor on the grounds beyond the sea dykes, because these grounds were lower than the sea dykes, and the tracking would thereby have been interrupted.

" What proportion too of the expense could be settled here between the appellants and respondent ? The right of tracking is not one confined to the appellants, but is open to all His Majesty's subjects. The interlocutor of the Court, on this point, appears to me to say, that if a proprietor raises sea banks for his own purposes, he shall be entitled to take a toll to maintain them from those who, in the exercise of their right of tracking, are obliged to use them. I think such a principle utterly unmaintainable.

" If the fact be, that the respondent was not heard upon this in the Court below, and if substantial reasons could be shown on behalf of the respondent's claim on this point, I should be extremely sorry to shut him out from being heard thereon. I feel a difficulty whether to move for a reversal of the judgment upon this, or to allow the respondent to be farther heard thereon. If it is not argued to us betwixt and Friday on his part, that he could support this by a hearing, I shall take it for granted that this part of the interlocutor is not to be sustained.

1806.
 CARRON CO.
 v.
 OGILVIE.

"Both parties reclaimed against the interlocutor which I have stated, and new writings bearing upon the points at issue were discovered, and laid before the Court. Then the interlocutor of 5th February 1800 was pronounced, (here his Lordship read the same.)

"My mind cannot see, what there is in the right of tracking on the south side of the river that does not also apply and exist with reference to the north side, except where such right, may be gone, by interruption, and an interruption acquiesced in. The right must either amount to a legal usage, or must not be sufficient to found one. The language of this part of the interlocutor, therefore, appears to me inaccurate. My observation on this is made only to inquire, if it will enable us to sustain the subsequent part of the interlocutor, limiting the right of tracking on the north side of the river within certain definite points.

"Speaking as an English lawyer, it appears to me that this interlocutor contains a great deal more of what I may term *judicial compromise*, than we could allow in our courts of this country. But, after looking as narrowly at this case as I possibly can, and having reference to the principles of the law of Scotland upon prescription, and the interruption of prescription, though I am not prepared to say that I understand the facts upon which it is to be supported; yet, on the other hand, I do not see sufficient grounds on which to advise your Lordships to reverse the opinion of the majority of the Court as to this.

"As to the declarations in the interlocutor, that the pursuers may fix mooring posts at convenient places at either side of the river, this appears to be right; but if the king's subjects have a right to mooring posts upon this river, even upon the sea dykes or other erections made by the neighbouring proprietors for their own accommodation, it will be very difficult to sustain the latter part of this interlocutor, with regard to the damage done to the sea dykes by the mooring posts.

"One principal difference between the parties as to these was, with regard to the propriety of the reference to the Sheriff. But this reference was made; and, in the subsequent directions with regard to the placing the mooring posts, it does not appear to me that the Court has gone beyond their powers in this species of arrangement.

"Upon the whole, if it be sufficiently proved, (as I think it is), that a right of tracking exists on both sides of this river, then the general law has nothing to do with this case; and the alteration of the course of the river is nothing. The right of tracking still continues, without regard to such alteration. His Majesty's subjects might for a time yield to this, and use a boat. I see no principle upon which the right of tracking should be confined to the south side more than to the north; and I think I see too much of *judicial compromise* in what the Court has done; but I think, at same time, that the *acquiescence* of parties has *shut them* out

from their right of tracking at the particular places alluded to. But there appears to be no ground on which to throw upon the appellants any part of the expenses of, or damages occasioned to the respondent's sea dykes, constructed for the improvement of his lands.

1806.

CARRON CO.
v.
OGILVIE.

" On these grounds, it is my intention to propose an adjournment till Friday, that we may learn, in the meantime, if the respondent wishes to be farther heard in the Court below; and to hand in what occurs to me as a form (of the judgment), which, on account of the number of interlocutors, is involved in some difficulty."

On his Lordship's motion, the cause adjourned accordingly.

On 7th March 1806, Case resumed.

THE LORD CHANCELLOR ELDON said,—

" My Lords,

" I have to state, that I found, upon inquiry, that the points with regard to the expense of keeping up the sea dykes had been fully discussed in the Court below, and I do not find it necessary to have any farther hearing thereon; but as to these, I shall reverse the interlocutors."

It was ordered and adjudged, that so much of the interlocutors dated the 5th and signed the 18th Dec. 1798, as finds that the pursuers (now the original appellants), must bear a proportion of keeping up the defender's (now original respondent) sea dykes used by them as tracking paths, and as remits in the process of declarator to the Ordinary on the Bills to hear parties' procurators on the proportion of expenses to be paid by the said pursuers, be *reversed*; and that so much of the said interlocutor as finds that the pursuers have a right to track on both sides of the river be affirmed, with the exception hereinafter mentioned. And it is further ordered and adjudged, That the said interlocutor, dated the 5th, and signed the 7th Feb. 1800, be affirmed, so far as it finds that the pursuers having right of tracking on the whole south side of the river, as far as the defender's property on that side extends; and also so much of the said interlocutor as relates to tracking on the north side, finding as follows: That the pursuers have a right to track on the whole of the north side of the river, so far as the defender's property extends, with this exception, that in the circumstances proved in this case, they are not at liberty to track on that space which is interjected between the east corner of the square building marked on the plan where the pitch house formerly stood, and the old boundary of the de-

1806.
 CARRON CO.
 v.
 OGILVIE.

fender's property to the west of the mansion house, and so far continue the interdict; and as to the rest of the north side down to the eastern march of the defender's property, remove the interdict. And it is further ordered and adjudged, That so much of the said interlocutor dated 5th, and signed 7th Feb. 1800, as can be understood to find that, in so far as the pursuers make a reasonable use of the sea dykes, or otherwise of their right, for the purpose of tracking, they must pay any damage thereby occasioned to the dykes, be *reversed*. And it is further ordered, That the said interlocutor, so far as the same relates to mooring posts, and so far as the same is not altered with respect thereto by any subsequent interlocutor or interlocutors appealed from, be affirmed. And it is declared and adjudged, That the said interlocutor, so far as it finds the pursuers answerable for any damages occasioned to the sea dykes, or otherwise, by the due execution of the right of placing, or by the reasonable use of mooring posts lawfully placed, be reversed. And it is further ordered and adjudged, That all the other parts of the said interlocutor of the 5th Feb. 1800, and also the interlocutors of the 4th March and 24th June 1800, and the interlocutor dated the 18th and signed the 23d June 1801, be affirmed, with such variation only, if any, as may be necessary to make them consistent with what is hereby ordered and adjudged with respect to the several parts of the said interlocutors of 14th Dec. 1798, and 5th Feb. 1800. And it is further ordered, That the cause be remitted back to the Court of Session in Scotland to proceed accordingly.

For Appellants, *Wm. Adam, John Clerk.*

For Respondents, *Wm. Alexander, Arch. Campbell, W. Murray.*

NOTE.—Unreported in the Court of Session.

ELIZABETH CRAUFURD, Relict of the deceased John Howieson, Esq., and afterwards Wi- dow of the Rev. Mr. Moodie, and Wm. BE- VERIDGE, W.S., her Trustee, and Tutor for Wm. MOODIE, an Infant, her Son, -	} <i>Appellants;</i>	1806.
THOMAS COUTTS, Esq., and Others,		CRAUFURD, & C. v. COUTTS.
	<i>Respondents.</i>	

House of Lords, 6th Aug. 1803, and 14th Mar. 1806.

DEATHBED—REVOCATION—APPROBATE AND REPROBATE.—Circumstances in which the heir-at-law was held not excluded from challenging a deed executed on deathbed, although she was excluded by a prior *liege poustie* deed executed in favour of a stranger, reversing the judgment of the Court of Session.

This is the sequel of the appeal reported, Vol. iv. p. 100. In the former appeal, the case was remitted back to the Court of Session, to reconsider the interlocutor, the Lord Chancellor having entertained doubts as to the correctness of the judgment formerly given. It will be there seen that Colonel Craufurd, of Craufurdland and Monkland, had in 1771, executed a settlement of his estates to Sir Hew Craufurd, who was not his heir-at-law, under express reservation to revoke and alter, in whole or in part, at any time in his life, *et etiam in articulo mortis*. In 1793 he executed a settlement, conveying his estates of Craufurdland to and in favour of a different party (Mr. Coutts) whereby he expressly revoked the deed of 1771, but only to the effect of sustaining the deed 1793. This latter deed was executed on deathbed; and the question raised by the appellant, Mrs. Craufurd or Howieson, the Colonel's heiress-at-law, was, as the deed 1771 was expressly revoked by the deed 1793, and the deed 1793 ineffectual to convey heritage, as executed on deathbed, whether she, as heiress-at-law, was let in?

The Court of Session, on resuming the consideration of the case, under the remit of the House of Lords, ordered memorials, and a hearing.

By the deed 1771 the heir-at-law was excluded, and another preferred. By the deathbed deed the previous deed of 1771 was revoked, and another stranger called to succeed. It was therefore contended by the respondent, that the heir-at-law had thus no interest to challenge the deathbed deed, *that deed* not being to *her prejudice*. It was further contended, that she could not both found on the deathbed deed, as revoking the deed 1771, and at same time seek to reduce it. It was answered, that the moment the deed 1771 was revoked, as to the conveyance of the estate, the heir-at-law's right revived; and

1806. that though she challenged the deathbed deed as a convey-
 —————
 CRAUFURD, &c. ance to the estate to his prejudice, she did not challenge
 " that part of it which revoked the conveyance of 1771, which
 courts might nevertheless stand entire.

Feb. 3, 1801. The Court thereafter pronounced this interlocutor, hold-
 ing that the heir-at-law was excluded. " Adhere to these
 ' interlocutors, assoilzie the defenders from the reduction,
 " in so far as concerns the lands of Craufurdland, and
 " decern.' "

* Opinions of the Judges.

LORD PRESIDENT CAMPBELL said,—“ It has been supposed that this is a complex and an intricate question upon the law of deathbed, and peculiar to the law of Scotland; that the argument in support of the former judgment is obscure, and involving in it some degree of inconsistency, and that the law of deathbed is in danger of suffering if the judgment is adhered to. But when the real nature of the question is clearly understood, it will be found, that although it involves in it a point relative to the peculiar law of deathbed, it is truly of a more general nature, in so far as it arises upon the construction of different deeds, and where we must resort to the common legal rules of construction, in order to find out the import and effect of them, the deeds themselves not being at one, and objections set up which are said to strike against their validity in part but not in whole, no matter whether arising from deathbed, or from any other ground in law or fact.

“ It is believed many such questions are to be found in the English Reports as well as in ours. See Cases in Equity, abridged, vol. i. p. 403; vol. ii. p. 776.

“ In all such cases, where we have different and contrary deeds, and perhaps conflicting rules of law to consider, and different interests to attend to, we are necessarily called upon to inquire, what was the *will*, and what were the *powers* of the maker of such deeds? What did he intend? What has he actually done? What had he a right to do? and what have the contending parties an interest and a right to demand? This is precisely what occurs here, and, in whatever way the determination may be given, the peculiar law of Scotland, with respect to deathbed, will remain just as it did before, without being in any degree affected by it. The one party pleads upon the law of deathbed. The other admits that law; but says, that this case is not within it, and denies the right of the pursuers to make it a deathbed question. Whether it is or is not, your Lordships will determine, upon a fair examination of the deeds founded on.

“ Before taking a minute view of the deeds, let me say a word or two upon a general topic which has often been the subject of discussion in such cases as the present, viz. Upon the effect of a clause, re-

erving power to alter, &c. *etiam in articulo mortis*. It is properly enough observed in p. 42 of the pursuers' memorial, that clauses of this kind are often of very little significancy one way or another. In the present case, where the deed remained within the granter's power to the last moment of his life, and the fee of his estate also in him, this clause did neither good nor harm: for, supposing there had been no such words in the deed, I am of opinion that Colonel Craufurd would have done exactly what he did with the supposed help of these words, because there was nothing done to take such power out of him.

"Clauses of this kind are meant for a different case, viz. Where the granter divests himself of the fee, or has tied himself up in some other shape, e. g. by contract of marriage.

"He may do this, either absolutely, or attended with the quality and condition that he shall nevertheless have a reserved faculty or power to make alterations, or to impose burdens; and, for the most part, these words, *etiam in articulo mortis*, are added.

"It is on all hands agreed, that the addition of these words will have no effect, if the heir *alioqui successurus* has not been excluded by any act done or deed executed *in liege pouslie*. How far they can effect a *stranger*, called in to the succession, under that precise quality, is a different question. When this question first occurred, it must have been attended with some doubt and difficulty, not as between the heir *alioqui successurus* and the heir pleading upon the deathbed deed, but between the person called by the *liege pouslie* deed and the latter; for it is very plausible to say, that no man can, by any clause of this kind, or by any figure of words, assume to himself the power of dispensing with the law, by doing what the law prohibits him from doing, viz. Disposing of his heritage on deathbed; and, therefore, that this condition ought to be held *pro non scripta*, or to be so limited as to admit of alterations only when executed *debito tempore* before the granter comes to be on deathbed; and further, that the person, although a stranger, who is called in to the succession, vesting in him a certain right of fee, defensible only by lawful deeds, must now be considered as the heir *alioqui successurus*, and ought not to be thrust out again by any deed on deathbed. The contrary argument, however, has unfavourably prevailed in such cases, viz. That a *stranger* called in to the succession in this qualified manner, must give way to the qualities and conditions under which he is called, and is not entitled to challenge the exercise of them even *in articulo mortis*. He has no other way of getting at the estate but by claiming under that very deed, and he cannot be allowed to approbate and reprobate, *i. e.* To play fast and loose with one and the same deed. It is against the stranger heir, not the heir-at-law, that such clause is pointed.

"Such would have been the question with Sir H. Craufurd, had the fee been put in him by the deed 1771. We are apt to startle at reserved powers to alienate on deathbed, and yet, unless we re-

1806.

CRAUFURD, &c.
v.
COUTTS.

1806.
 CRAUFURD, &C.
 v.
 COUTTS.

solve at once to depart from all the authorities and decisions upon this subject from the beginning, we could not, in the supposed case, have decided in favour of Sir Hew. But the present case is attended with still less difficulty, as Sir Hew never had the smallest hold of this estate in any manner of way. Colonel Craufurd himself remaining, by the deed 1771, in the *entire fee* of his estate, and likewise in possession of the instrument itself, which was locked up in his repositories, and therefore at the sole disposal of the granter at any period.

“Accordingly, Sir Hew has not been advised to compete with Mr. Coutts; or, in other words, it is admitted that Colonel Craufurd had a right to take this hope of succession from Sir Hew and to give it to another stranger in preference to him, even on deathbed.

“But now the heir-at-law steps in, and says, that since you have excluded Sir Hew, by laying aside the deed in his favour, you must also lay aside the other deed claimed on by Mr. Coutts, for the one deed being thus revoked, and the other liable to the objection of deathbed, you cannot join two nullities together, in order to make an effectual settlement in favour of either the one or the other of these gentlemen, and to carry off this estate from the heir-at-law, whose right is always complete, in so much that a conveyance or devise to such heir in fee is held null. This last observation seems to be founded upon some principle in the law of England which has no existence with us.

“But, be that as it will, the argument thus used for the heir-at-law seems to depend altogether on this, Whether, in a question with the heir-at-law, we can give an effect to the deed 1793 essentially different from what we give to it in the question with Sir Hew Craufurd.

“It assumes the very proposition which requires to be proved, and which has never yet been sanctioned by any authority or decision in such a case, viz. that one and the same party is entitled to set up two contradictory pleas upon one and the same deed, viz. that it shall be held as a good and valid deed to one effect, and null to another; that it shall be sustained, so far as it is favourable to his views, and set aside so far as it is prejudicial to them.

“The short question is, Whether the revoking part of the deed can be held as independent, and was executed with a view to intestacy, and whether it can attain that object alone, while the deed itself very clearly expresses that it was done *alio intuitu*, viz. to make way for another stranger heir, and for no other purpose or object whatever? The words of the revoking clause itself, as well as the new settlement in favour of Mr. Coutts, leave not the smallest room to hesitate about this. The revoking clause must be taken along with the context.

“The question is well put in the other memorial, whether Colonel Craufurd might not have explicitly said in his deed, that it was not

his intention to revoke the deed 1771, in favour of Sir Hew, unless to devolve the succession in favour of Mr. Coutts, and if this last object could not be obtained on account of the law of deathbed, or for any other reason, it was his determined will that Sir Hew should still be the heir, and that, in all events, his heir-at-law should remain excluded. Would there have been any room for the claim now made by the heir-at-law; and if so, is the language of this deed less strong, and the real import of it less clear, than in the case supposed?

1806.

CRAUFURD, & C.
v.
COUTTS.

"The reasoning in the two English cases above noticed, is very strong to this effect, and so are some of the decided cases: Dict. p. 215, case of Kerr. Kilkerran, p. 153, Dict. vol. iii. p. 172; 17th Nov. 1795. Baxters. Henderson v. Wilson, 31st Jan. 1797, Mor. 15444. House of Lords, 29th Mar. 1802, ante vol. iv. p. 316.

"Such clauses of reservation are in their nature conditional. It is not giving them fair play to hold them as independent deeds, unless it were so expressed in clear terms. The proper way of discharging this is by a separate deed, or by a reservation upon the back, or cancelling—and then, if another deed is executed not *incontinente* but *ex intervallo*, there may be room for the claim of the heir-at-law. Here it was all *pars ejusdem negotii*. Suppose Colonel Craufurd had ordered Sir Hew to make over nine-tenths of the succession to Mr. Coutts, or to pay him a sum nearly equal to the value of the succession; or suppose he had put in no express revoking clause, but done the same thing virtually by settling of new. In all these cases, it is admitted that the deed would have been good, yet these may as well be said to be devises, and the law of deathbed is as much affected by them as in the present case.

"The short answer, in all such cases, is, that the proprietor is exercising his legal right, and that the heir is hurt, not by the deed in *liege pousie*, against which no law operates; and there is no danger that any man will, in *liege pousie*, call a stranger into his succession with no view of favouring that person, but using him as a cover to let in another upon deathbed, for it is more than equal chance that he will die before executing this plan.

"The judgment, in short, already pronounced, is the necessary result of two distinct propositions, both of which are unquestionably true, viz. 1st. That the heir may be excluded in *liege pousie*. 2d. That he has no interest, and, consequently, no title to find fault with a deed which is not to his prejudice. See Tait's argument, information for Mr. Coutts, 22d April 1795, p. 35. It is a strong measure to divide and garble a deed. It ought rather to be presumed *in dubio*, that the whole was meant to stand or fall together.

"The judgment with regard to Monkland is perfectly consistent, —being founded on this, that the deed 1793 contains merely a revocation as to this, and does not dispose of it, and therefore the party who founds on this revocation, does not approbate and reprobate.

"It is impossible to distinguish between money heritably secured, and heritable property.

1806.

CRAUFURD, &c.

v.

COUTTS.

"Had there been only one deed, excluding her, and preferring another, she would have certainly been excluded."

LORD MEADOWBANK.—"This question is of little consequence as to future settlements, because the question may be obviated by more accurate expressions. But it is of consequence as to past deeds. The object here, on the part of the heir-at-law, is, to take advantage of a critical inaccuracy in the clause in question; but as I do not hold the objection to be good, I am therefore for adhering."

LORD POLKEMMET.—"I have been all along against the interlocutor. A party may, no doubt, disinherit his heir in *liege pousie*, but that supposes a deed *inter viros*, which is to continue effectual, though with reserved powers to alter, or even a *mortis causa* deed, if it is to remain the subsisting deed under which titles are to be made up. But, where it is cancelled or totally annihilated, so as to bring the deathbed deed to be the only subsisting one, then the heir-at-law may step in, because nothing excludes him except the deathbed deed alone. In the present case, the evidence is strong to point out that Sir Hew excluded the heir in all events. The *liege pousie* deed here is left as a blank, and good for nothing. No titles can be made up upon it. But if we can set up the deed 1771 at all, it would be as a mere trust not excluding the heir-at-law."

LORD HERMANT.—"I am of the same opinion. The deed 1771 was simply revoked. He might burden the heir to the extent of the value of the estate, or might order him to convey to another, but if he revoked, it is at an end. It is declared void and null. The rule of approbate and reprobate has been found not to apply to the Monkland estate. Why then apply it to the other? In the case of Cunningham, 10th June 1748, Mr Whiteford was heir in both deeds. In the case of Rowan and Alexander, there was a distinction taken between an express and an implied revocation."

Mor. App.
"Deathbed,"
No. 19.
Mor. 11371.

LORD ARMADALE.—"There are two questions here to be answered. 1st. A general one; and the 2d. One of a more limited nature."

"1st Whether a person can, in *liege pousie*, reserve a power, and do an act against the law, and which the law has prohibited him from doing. *Vide* Lord Chancellor's speech. The cases of Agnew and Hogg of Newliston seem to show that he may."

"2d Point is a mere question of construction, as to whether the deed 1771 was to stand good, in so far as it supported the deed 1793, and in so far as it did not, whether then there was revocation. And it appears to me that the deed 1771 is good *ad hinc effectum*. There is no material distinction between an express and an implied revocation."

LORD BALMUTO.—"The deed 1771 was completely revoked. The deed 1793 was executed on deathbed. The act of the granter strikes down the one; the law of deathbed has struck down the other. It would therefore be a fraud in the law of deathbed to sustain the last deed."

"LORD CULLEN.—"I am for adhering. The law of deathbed was introduced for the heir alone, and personal to him."

LORD BANNATYNE.—“ I am for adhering.”

LORD CRAIG.—“ I am for adhering.”

LORD DUNSINNAN.—“ Of same opinion.”

LORD STONEFIELD.—“ Of the same opinion.”

LORD JUSTICE CLERK.—“ I am for altering. The stranger called is a mere donee. An express power of revocation is not necessary as to him. It is only necessary to extend the granter's power against the heir; but as that has not been exercised in *liege pouslie*, and as the reservation to grant such deed, even on deathbed, is in face of the law of deathbed, I cannot agree to the interlocutor. It is true that the heir must have an interest. But here the interest arising from the revocation is plain. There is nothing in the clause bringing back the estate to Sir Hew Craufurd.

“ Suppose the deed had been cancelled, or thrown into the fire. Is the party to deprive the heir still of her right? I cannot assent to that proposition.”

President Campbell's Session Papers, vol. 100.

Against these interlocutors, in which these opinions were given, the present appeal was again brought to the House of Lords, urging the same arguments as in the former appeal.

After hearing counsel,

6th August 1803.

LORD CHANCELLOR ELDON said,—

“ My Lords,

“ This is a cause which has undergone more consideration than almost any which I remember in this place. I had hoped I should have found it in my power, before the end of the present session of Parliament, to have made a distinct proposition to your Lordships, either for affirming or for reversing the interlocutor pronounced in this cause; but I have not yet been able to form an opinion to which I can give the character of a judgment.

“ I have thought upon the cause, with much anxiety, again and again, but am not yet in possession of some facts, the knowledge of which would enable me the better to inform my own opinion. I am aware also, that some others of your Lordships, all now absent, whose sentiments are much attended to on such subjects, are not of one opinion in this case. One of the noble and learned persons to Lord Rosslyn. whom I alluded formerly, considered this case very minutely, and, I understand, adheres to his former opinion, maintaining it on the same grounds. Another also attended the pleadings in this cause, Lord Alvauley. though now necessarily absent, has inclined, I believe, to think that the present case is in substance, though not in mode and form, no more than other cases of exception out of the law of deathbed. A

1806.

CRAUFURD, &c.

v.

COUTTS.

* From notes revised by his Lordship.

1806.
 ———
 CRAUFURD, &c.
 v.
 COUTTS.
 Lord
 Thurlow.

third, who, from indisposition, has not been present at the deliberation of your Lordships during the present session, but who, whether absent or present, never fails to attend to what relates to the judgments to be pronounced by this House, I conceive him to entertain, as well as myself, considerable doubt whether, in a case of this sort, mode and form is not of the highest importance.

“ At one time, I thought that it might be advisable to remit this cause to the Court of Session for farther consideration ; but, recollecting the great consideration it had originally in that Court, and, after it came here, how much it was considered by the Lord then upon the Woolsack, and the very mature discussion too that it has received since, and the great expense incurred by the parties, it does occur to me, that future deliberation may be sufficiently employed, and further, necessary information may be otherwise obtained on the points I am to allude to, before the next session of Parliament. I have doubted the propriety of remitting also, because it is utterly impossible to do justice to the merit which I conceive belongs to the Court of Session, for the learned and painful discussion given to this case, and the mode in which they have discharged their duty with regard to it.

“ This cause arises out of the settlements of a Colonel Craufurd. He was seized of two estates in Scotland, Craufurdland and Monkland. In 1771, he executed a settlement, conveying both these in liferent to himself, and Sir Hew Craufurd and others, in fee. That deed contained a clause dispensing with the delivery ; and he reserved power to alter it at any time of his life, *et etiam in articulo mortis*. The adoption of such a clause, has been explained to arise out of what is termed in Scotland, *the law of deathbed*. To avoid what were supposed to be the inconveniences flowing from that law, it had been considered as law, that if a former deed had been executed in due time, a person might execute another even *in lecto*, which, in given circumstances, would be effectual. By connecting the latter with the former, the disposition was considered to have been made at the date of the former, and so not to be challenged as not being made in due time ; but, in most cases, at least the former, has been a deed valid, effectual, and subsisting in operation at the death of the granter.

“ About twenty-two years after making the first settlement, Colonel Craufurd, in 1793, executed a new settlement of his estate of Craufurdland. It will be noticed, that this contains a procuratory of resignation, a precept of sasine, and other clauses necessary for making up the feudal title in the person of the disponent, Mr. Coutts. This deed also contained certain superiorities in Renfrewshire, which were not contained in the deed of 1771. The estate of Monkland also was not given by this deed to Mr. Coutts. If it required a joint operation, therefore, of these deeds of 1771 and 1793, to make a valid disposition, it is plain that, as to the superiorities and the estate of Monkland, there was no effectual conveyance.

The deed of 1793 contains the following clause, on which the question turns. (Here his Lordship read the clause of revocation.)

1806.

"Of same date, the Colonel executed a conveyance of his estate of Monkland, by way of bargain and sale; but this was a fictitious transaction. The reason of his choosing this mode of making a settlement of that estate has not been distinctly explained. The disposition of 1771 was not then lying by him, and he did not recollect, perhaps, that Monkland also was excluded in that deed. He wrote a letter to Mr Coutts, to send him a bond for £5000 as the price of this estate; which, it is said, was accordingly executed. But it is not necessary at present to state farther as to this.

CRAUFURD, &c.
r.
COUTTS.

"The heiress-at-law then brought her action, to set aside these deeds. It has been correctly explained to us, that the word, "heir" is understood in Scotland in a different sense from what it is in this country. In Scotland, an heir may be the person pointed out by destination of former settlements of an estate. In this country, the heir takes purely by descent; and the person taking by a destination is considered as a purchaser, as a person not taking in the quality of heir. Mrs. Howieson was the person destined to the succession by the settlements of the estates prior to 1771. She contended, that the deed of 1771 was made a nullity by the deed of 1793; that the deed 1793 was also a nullity, being executed upon deathbed, and that you could not, (in the phrase of a noble and learned Lord, who formerly, in this House, considered this case), by splitting two nullities together, make a valid conveyance of the estate to Mr. Coutts.

"In this action, Mrs. Howieson called Sir Robert Craufurd,* as well as Mr. Coutts, as defenders. (Here his Lordship read the conclusions of her summons, Mr. Coutts' defence, and the interlocutors 12th June 1795, and 17th November 1795.)

"After the question of deathbed had thus been decided, Sir Robert Craufurd appeared, and contended that the deed of 1771 was not absolutely revoked, and that, if Mr. Coutts did not take the estate of Monkland, under the fictitious sale, that he was entitled to it. Upon this point, the Court pronounced an interlocutor, adverse to Jan. 30, 1798. Sir Robert's claim, declaring, that the settlement executed by Colonel Craufurd in 1771 was effectually revoked by the clause of revocation contained in the deed of 1793. It is fair, however, to observe, that the principle of the declaration cannot be stated more broadly, than that the deed of 1793 had no other effect than the effect of revoking as to the estate of Monkland. The decision, as to that estate, does not amount to a declaration of the Court, that they ought to have come to the same decision as to the estate of Craufurdland, because the two estates were in different circumstances. Sir Ro-

* Sir Robert Craufurd was the heir of Sir Hew Craufurd, in whose favour the deed 1771 was granted.

1806.

bert Craufurd appealed against this judgment ; but his appeal was dismissed for want of prosecution.

CRAUFURD, &c.
v.
COURTS.

“ Mrs. Howieson also brought her appeal against the judgment as to the Craufurdland estate. When the cause came to a hearing in this House, very great attention was paid to it. I hold in my hand a note of what fell from the noble and learned Lord, then on the Woolsack, when the cause was sent back to the Court of Session, from which I shall read some extracts. (Here his Lordship read the greater part of manuscript notes of Lord Rosslyn’s speech, which could not be perceived to differ in any particular from what is printed in Mrs. Howieson’s last memorial.)

Vide ante, vol.
iv. p. 100.

“ I have also the notes of the opinions formed by the Judges of the Court of Session, as they have been handed to us, and of what passed in consequence of your Lordships’ remit. I should be wanting in due respect to that Court, if I did not state it as my opinion, that it is impossible to have discharged a duty more carefully, more anxiously, and more sedulously, than the Court have discharged theirs in this case. They differ considerably in opinion ; but it has been the opinion of the majority, that the former judgment was right. From these notes, I cannot, however, accurately and precisely collect their respective opinions upon some, as they appear to me, important points. The cause came again here by appeal, and has since been most ably argued by advocates from Scotland. The cases, whether similar or analogous, have been fully sifted, and the law of deathbed, and its effect on the public convenience, fully examined.

“ As to the law of deathbed, I never thought it necessary very anxiously to discuss its operation, as convenient or inconvenient ; it is enough, that it forms undoubtedly part of the law of Scotland. It seems to have been relaxed from the rigour of the general doctrine concerning it in several decided cases, just as, in some cases, the law of England, with regard to devises by will, has also been relaxed. Though it be positively laid down, that a mere deed on deathbed shall not disappoint the heir ; yet if a former deed had been granted in *liege poustie*, the granter might, by a deathbed deed, burden the grantee of the former deed, so as to leave nothing valuable remaining of the title to the beneficial interest of the estate given to such former grantee ; the former deed remains, in that case, valid as a title deed to the estate, however burdened by the latter deed.

“ Analogous decisions have been pronounced in this country on the statute, regulating the forms of attesting wills of land. By that statute, three witnesses are necessary to attest a devise of real estate ; yet, it has been held, that if a testator devises his lands by a will so attested, subject to the payment of debts and legacies, he might afterwards, by any writing, with or without witnesses, and even by any parole transaction forming a contract of debt, charge, in legacies and debts, the devisee to the full value of the estate, though he could not so dispose of so much of the land itself as was

of half a crown value to any creditor or legatee. Here, however, the estate remains in the devisee under the altered will, however burdened by what is not attested. When a devise is duly made to trustees by sale of real estate, to pay certain sums to given persons, and the residue to A B, I apprehend that a subsequent devise of this surplus, or residuary interest, attested by two witnesses only, cannot be good. So much have we thought from matter of substance, that, in this country, when it has been desired by parties that the Courts should apply the decided cases by analogy to others, the Courts have refused to say, that, because you may in one mode effectually do what you intend to do, therefore, if you intend the same thing in effect, you may execute your intention in any other new mode of accomplishing it. The knowledge of this, as an English lawyer, may have perhaps caused a great difficulty in my mind in the present case.

1806.

CHAUVERD, &c.
v.
COUTTS.

"I come, therefore, now to mention a doubt upon this cause, which I have not yet been able to get rid of. In most of the cases which have been cited, the first deed—the *liege poustie deed*—has remained an effective operative instrument at the death of the grantor. I do not mean, as leaving a title to anything beneficial in the grantee of the *liege poustie deed*, but as continuing at the death of the grantor an interest in the grantee of the *liege poustie deed*, on which the grantee of the deathbed deed must found his right, and to which he must knit and attach it.

"If one makes a *liege poustie deed* in favour of one of your Lordships, and afterwards, by a second deed on deathbed, burdens the grantee thereof with some charge, the heir *alioqui successurus* would be, by the first deed, effectually cut out, and the grantee under the first deed, is clearly bound to fulfill the directions of the second deed; for he cannot avail himself of the law of deathbed. So also is it the case, if the grantee of the first deed is ordered to convey to a person named in the deathbed deed. In both these cases, the heir *alioqui successurus*, if cut out by a *liege poustie deed*, available at the granter's death, in the one case, the *liege poustie deed* will give the title to the estate, though burdened; in the other, it will also give it, though to be conveyed. In both, it is a subsisting operative instrument at the death of the granter, cutting out the heir's title.

"It is said, if you may disappoint your heir in this way, why not also by the mode used in the present case? if, by giving a title to an estate burdened to its value, as to be wholly conveyed away, why not by a deathbed deed give the estate itself, a *liege poustie deed* having been once executed, my difficulty is to admit, that a person can do what he has the power of doing, by all the different modes in which he pleases to do it. The principle of the former cases appears to go to this, that the grantee of the first deed would take, if the deathbed deed was not effectual; and that the heir *alioqui successurus* had nothing to complain of in such a case, and the grantee of the first deed could not make any complaint. Now, though it be

1806. true that the present decision puts Mr. Coutts' case on the same footing, yet I do not find, either in these notes of the opinions of the judges, or in the arguments of counsel at the bar, what is precisely the effect of the deed of 1771, in the contemplation of law at the grantor's death. If a title to any estate is, at the grantor's death, left in the grantee of that deed, the case falls under one consideration; but if that deed, at the death of the grantor, was absolutely revoked, it is, in effect, the same case as if the *liege poustie* deed had been a disposition to the heir *alioqui successurus*, or as if it had never existed. When the interest under the deathbed deed knits and attaches itself to an estate to be claimed under the former, there is a *liege poustie* deed disposing of the title, but if there is no such estate to which that interest can attach, there is nothing but a mere deathbed deed.

CRAUFURD, &c.
v.
COUTTS.

“ To explain myself farther: I have frequently put a question to my own mind of this nature, perhaps suggested by ignorance. Suppose the deed of 1793 had contained neither procuratory nor precept, it might still have furnished a good ground of action, to get the property in due form; but who would have been defender in such a case? Would it have been the heir-at-law or Sir Robert Craufurd? If Sir Robert Craufurd had no title to any estate remaining in him, then no action would lie against him. If the action was to be brought against the heir, must it not be admitted that the heir had some how or other got back the estate? This question has not been answered at the bar, though put at the bar. The answer to it I must endeavour to collect, and I want to know, whether the deed of 1771 be a necessary operative instrument in Mr. Coutts' title, as he must make it, or if he might, without prejudice, throw it in the fire. In one word, I wish correctly and precisely to know its effect, and whether the grantee of that deed is considered as entitled in law to any estate or interest on the property, in order thereon to make good Mr. Coutts' title?

“ It was said that the deed of 1771 was not fully revoked, but only revoked *quoad certum effectum*; and that this was more a question of intention than of power. I doubt whether it is not a question of intention and power. I entertain no doubt of Colonel Craufurd's power to have given the estate to Mr. Coutts, nor of his intention to give it to him; but the law frequently gives the power of effectuating the intention, only in one mode, and you can do what you intend only in that way, and no other. If by saying that this is only a revocation *ad hunc effectum*, you mean that the deed is not revoked, but that Sir Robert Craufurd's title to the estate, burdened with a duty to convey or denude, for the benefit of Coutts, must be taken to continue for the purpose of so effectuating Coutts' title, then the deed is not wholly revoked: but, if it is wholly revoked, it seems difficult to argue, that because if a *liege poustie* deed remains effectual at the death of the grantor, a deathbed deed shall defeat the heir, therefore also

the heir shall be defeated merely because a *liege pouslie* deed had been executed, but which did not remain in effect at the death of the grantor.

1806.

CRAUFURD, & C.

v.

COUTTS.

" If Mr. Coutts had declined to take this estate, I wish to know who would, in that case, have been entitled to it ; would Sir Robert Craufurd take it in such a case ? The judgment admits that the intention was exercised in a way to take the beneficial interest from Sir Robert Craufurd. If it be not given to Mr. Coutts, how should the heir proceed to make good his title ? Must he contend with Sir Robert Craufurd or Mr. Coutts ? Could it be argued, if Mr. Coutts had not taken, that the intent to revoke was only *ad hunc effectum*, viz. to give to Mr. Coutts, and, therefore, if he would not take, that Sir Robert should ?

" I may mistake this matter very much, but I have not been able to find any case where the law of deathbed did not take effect in favour of the heir, if the *liege pouslie* deed remained at the grantor's death without any effect as an instrument through which the title must be made up ; and the notes to which I allude, as well as the argument at the bar, contains assertions that Mr. Coutts must make up his titles under the deed of 1771, without explaining how, or the contrary assertion also, that he need take no notice whatever of it. As to these points I wish for further satisfaction. If he need take no notice of that deed, I doubt whether authority has gone the length of this judgment. If he must take notice of it, in what way he is to do so, has not been explained. I admit that it was Colonel Craufurd's intention to have revoked only *ad hunc effectum* ; but I question if the purpose of the revocation be sufficient to sanction a new mode of conveying, if it be such ; for I do not presume at present to say, whether or not the meaning of the words used is understood to be such as puts the judgment on this ground, and this only, that because there was once, though not at the grantor's death, a *liege pouslie* deed, therefore the deathbed deed is good.

" I could put many cases from the law of this country illustrative of these difficulties I entertain. Suppose I were to make a will in this country, devising my real property to a certain person ; and were afterwards to execute another will revoking my former will, and that I might make the other, and then devising my real property to one not capable of taking, the revocation would be perfectly good ; but the devise being ineffectual, the heir-at-law would come in, though the intent of my act was, to continue the exclusion of him. There is a fallacy, therefore, in the argument as to the effect of a revocation made *ad certum effectum* : if the revocation be complete, and an entire revocation is not a right mode of proceeding *ad hunc effectum*, the revocation will be good, and the disposition will be good for nothing.

" If I were to intend to revoke a will already formally made in this country, meaning, at the same time, to execute another in due form, and had such will prepared and ready for execution, but was

1806. arrested by the hand of death before completing it; we hold, in that case, that the former will is not revoked, because the revocation is not complete, and the devisee under the former will would take.

CRAUFURD, & C. v. COURTTS. Neither of those cases so put from our law, would support by analogy the present judgment. In the former case, the heir is let in; in the latter, the first devisee. But this judgment excludes both the heir and Sir Robert Craufurd.

"I may state unreservedly upon this part of the case, that I am not much impressed with the consideration of it, as being an evasion of the law of deathbed, or not such. There seems no doubt but that, in the circumstances of the case, it was completely in the power of Colonel Craufurd to have disappointed the law, and I consider the question as a question whether he can do it in this mode; whether he can do it without having a *liege poustie* deed in actual effect at his death. The suggestion so often made, that the heir was already cut out by the *liege poustie* deed, appears to me to assume all that is in dispute. For the heir cannot be said to be cut out till the death of the granter, and, therefore, it may be said that if, at that time, there is no effectual *liege poustie* deed, there was never any *liege poustie* deed that attested his title.

"Another doubt with me is, if this case has been decided by the Court below on the point of *approve* and *reprobate* or not? I see in the notes of individual judges' opinions, that some of them have laid great stress upon this doctrine, though others thought differently of it; but the judgment of the Court, as to the first point, I cannot collect.

"If the judgment were put on that alone, I should entertain great doubt of it. It seems very nearly to resemble the doctrine of election in this country; though I am aware of the difference between what is understood by the word heir in Scotland, and what we understand by that term. The heir has been stated to be, whom God and nature have made such—I should say that the heir, in England, is a person succeeding by the mere operation and provision of the law.

"In our doctrine of election we hold, that if a person takes benefit under any instrument, he must submit to the instrument altogether. But if I give a legacy in money to my heir-at-law, without an express condition annexed to the legacy, and give, by the same will, part of my real estate to another, and this without the attestation of three witnesses; the heir is entitled to take the legacy, and at same time to say, that this is no good devise as to the land; and, accordingly, in such a case, the heir would take the estate. So in the case of a devise against the statute of mortmain, he would take against such a devise, though he claimed under the same will. For these are not cases of election.

"If the English doctrines are to rule, this is nothing like a case of election. The heir here does not take the estate or benefit under the instrument, but under the law. If a testator in this

country was required to make his will of land sixty days before death, it would be quite competent for the heir to say here, this is a deathbed deed. I take the benefit of the law, and I take that land under the benefit of the law, and he might take personal benefits under the will. There may be, however, a considerable difference, attending to the distinction of character, between an heir in England and Scotland, and it is impossible not to see that some cases have been decided in Scotland which very nearly support the doctrine of *approbate and reprobate*, as applied in this case.

1806.

 CRAUFURD, & C.
 v.
 COURTS.

“A person in this country cannot, by a will of land, made and attested in a regular form, reserve a power of making a future devise of the land, which should be attested by less than three witnesses. The courts of this country, though they have admitted subsequent bequests, otherwise attested, of the whole value of the land, do not admit them as to a particle of the land itself, and the bequests of the value of the land must be supported by,—must knit and attach themselves to,—an instrument remaining at the death of the testator, effectual to give the title to the land itself against the heir-at-law. The title to the land, to convey the benefit of the land to those claiming under the unattested bequests, must remain at that time in some person claiming under a testamentary instrument, duly attested, to pass an estate in the land. And upon principles which, because they are very familiar to my mind, and perhaps affect it too much in the present case, I doubt whether the deathbed deed can be supported, unless it can be founded upon some claim to the estate available against the heir, created by deeds continued available until, and at the death of the granter, by the deed of 1771, to which the title under the deed 1793 may knit and attach itself, just as a burden by a deathbed deed would attach itself to an estate created by a *liege poustie* deed.

“If it were my duty to decide the present case this day, I should feel it a very irksome task, to pronounce that the judgment was right or wrong. I believe that my noble and learned friend, who has long paid so much attention to cases from Scotland, entertains considerable doubt of the judgment; whether an estate of some kind or other be not remaining in Sir Robert Craufurd—whether the *liege poustie* deed, in making up the titles, is to be regarded as an absolute nullity. It would be altogether indecent to decide the cause at present, in the absence of all the noble and learned lords, if I was more able than I am to state a judgment upon the case. But, knowing the delay that has already taken place, and the anxiety that the parties must feel, where such property is at stake, I should not have held myself excusable, had I not detailed to your Lordships, at some length, the whole circumstances operating upon my mind, when I propose that judgment should be postponed.”

On his Lordship's motion, the cause was adjourned till the second day in next session of parliament.

1806.

7th March 1806, case resumed.

CRAUFURD, & C.
v.
COUTTS.

LORD CHANCELLOR ELDON said,

" My Lords,

" This is a cause which has already occupied a great deal of attention from the Court of Session and from your Lordships. I shall not be able to conclude to-day all I have to say upon the cause, but, after trespassing upon your indulgence at present, I mean to move that the cause be put off till Tuesday, to be then concluded,—but it is my intention to give the parties to-day a certainty how the cause will be disposed of, and not to occupy much time with what will remain for Tuesday.

" This cause originates in the settlements executed by Colonel John Walkinshaw Craufurd, the representative of an ancient and respectable family. He was seized and possessed of two estates, Craufurdland and Monkland, in the county of Ayr. In 1771 he executed a deed of settlement, to keep up the representation of his family, of his estates of Craufurdland and Monkland to himself in liferent, and to the heirs of his body in fee; whom failing, to Sir Hew Craufurd, and the heirs male of his body; whom failing, to a certain other series of heirs.

" This deed contained a power to revoke at any time of his life, in *liege poustie*, or *in articulo mortis*. It remained in the repositories of the granter, undelivered at his death.

" This instrument appears to be evidence of a purpose on the part of Colonel Craufurd to defeat the heir *alioqui successurus* from 1771 down to 1793. At same time, it is fair to observe that this case will fall to be decided as if the deed of 1771 was executed only sixty-one days before the death of the testator.

" When, as is admitted on all hands, Colonel Craufurd was on deathbed, he executed a new settlement in February 1792, of the estate of Craufurdland, in favour of Mr. Coutts, his heirs and assigns, containing a procuratory of resignation, or precept of sasine, or other usual clauses, (the same as in the former deed), for vesting the estate feudally in the disponent. We shall have to consider whether this deed be one altogether substantive, or if it be to be taken in connection with the former deed.

" This deed, besides the estate of Craufurdland, conveyed certain superiorities, which were not contained in the deed of 1771. These were clearly gone by the law of deathbed.

" With regard to the estate of Monkland, this deed did not attempt to convey it to Mr. Coutts. I call your attention to this at present, as I shall afterwards have occasion to refer to it more particularly when considering the principle of the interlocutors as to Monkland. (His Lordship now read verbatim the disposition of Craufurdland to Mr. Coutts. Previous to reading the clause of revocation he made some observations thereon.)

" You will observe that this was a deed under conditions, reservations, and declarations, under which Mr. Coutts might have de-

clined to take the estate. Hitherto, it has every appearance of a substantive and independent disposition. (Here his Lordship read the clause of revocation.)

1806.

CRAUFURD, & C.

v.

COUTTS.

" This clause, in revoking the former settlement executed by Colonel Craufurd, of course revoked also the procuratories and precepts contained in the former deeds.

" The day after the date of the deed, Colonel Craufurd wrote a letter to his agent, directing him, after his death, to open his repositories at Craufurdland. When this was done, the deed of 1771 was found lying there. He had not cancelled this former settlement, and, if cancelled at all, it is so by the deed of 1793.

" Colonel Craufurd died soon after, but before his death, and of same date of 1793, he executed a conveyance of Monkland, bearing on the face of it the receipt of £5000, said to be paid by Mr. Coutts as the price thereof. At same time he wrote a letter to Mr. Coutts to send him his bond for that sum. If that bond was sent, it did not reach Colonel Craufurd in time, for he died six days after the date of the deed.

" I must here mark the difference of the situation of the two estates of Craufurdland and Monkland. The heir *alioqui successurus*, by the judgment of the Court below, got this last estate. In their interlocutor of 31st Jan. 1798, the Court found that the deed of 1771 was effectually revoked by the clause of revocation contained in the deed 1793, in consequence of which the estate of Monkland was adjudged to the heir. It was contended that the principle of the decision as to the estate of Monkland was directly contrary to that in regard to the estate of Craufurdland.

" The deed of 1793, conceived in favour of Mr. Coutts, embraced the estate of Craufurdland and the superiorities only, and did not affect the estate of Monkland, except in the clause of revocation. The clause of revocation revoked the deed of 1771 as well with regard to Craufurdland as to Monkland; but it also gave Craufurdland to Mr. Coutts, and not Monkland.

" The attempt to dispose of Monkland for a price, was not fully completed, because not acceded to by Mr. Coutts in Colonel Craufurd's lifetime. As to Monkland, it was also clear that he meant the heir not to succeed, but the purpose of selling was only an inchoate purpose.

" The decision as to the estate of Craufurdland is upon the ground, that as to it the revocation of the deed 1771 was not an absolute but a qualified revocation to support the deed of 1793. Whereas the revocation as to the estate of Monkland, of which the new conveyance was set aside, restored the right of the heir *alioqui successurus*.

" The difficulty upon the interlocutor is, that it lays down as a general principle, that the deed of 1771 was effectually revoked by the deed of 1793, and does not express that it was only revoked as to Monkland, and not as to Craufurdland, which was the meaning of the Court.

1806. "The principle so generally laid down in this interlocutor, was pressed against Mr. Coutts, but further than it would go. There may be a finding in an interlocutor in too general terms, and still the conclusion be a sound one. In considering this case, it is very material to take into view, if the decision as to the estate of Monkland be consistent with that as to the estate of Craufurdland; but it is too much to say that the decision as to Monkland is one directly contrary to that with regard to Craufurdland.

CRAUFURD, &c.
v.
COUTTS.

"After Colonel Craufurd's death, Mrs. Howieson, his aunt, the heir, (not as we understand the term, but the heir *aliouqui successurus*, as it is termed in Scotland, under former destinations in her favour, claimed these estates.) In prosecution of her claims, she executed a trust bond, as usual in such cases, on which an adjudication was obtained, and afterwards an action of reduction was brought against the heir of Sir Hew Craufurd and Mr. Coutts.

(His Lordship here read the conclusion in the summons of reduction, noticing the more especial ground on the law of deathbed; he next read the interlocutor 12th June 1795, sustaining the reasons of reduction as to the superiorities, which was not in the deed of 1771, and repelling them as to the estate of Craufurdland, and the interlocutor of 17th Nov. 1795, adhering thereto.)

"After the Court had thus decided as to the estate of Craufurdland, Sir Robert Craufurd, conceiving that the deed of 1771, if not revoked, gave him the estate of Monkland, put in his claim to that estate; but, after a discussion upon that point, the Court, by their interlocutor of 31st January 1798, to which I have already alluded, found that the deed of 1771, in regard to Monkland, was effectually revoked by the deed of 1793.

"Then came the first appeal to your Lordships, which was heard, and remitted back to the Court of Session. Lord Loughborough was then upon the Woolsack, and another noble and learned Lord concurred with him in the opinion which he had formed. These two great and eminent persons were not content to discuss this question, as one depending merely on this construction of the instruments which I have stated, but, conceiving that there was in the principle of the judgment something vicious in regard to the law of deathbed, they were still anxious not to decide it, fearing that their own view of the case might bring into danger a system of securities as to trust bonds, then of some standing in Scotland. The substance of the opinion delivered by Lord Loughborough in that case, was as follows: (Here his Lordship read the same as printed in Mrs. Craufurd's memorial of 16th October 1800, commenting upon it as he proceeded.)

Mor. 11371,
et Hailes, vol.
2, p. 659.

"On the case of Rowan against Alexander, quoted by the noble and learned Lord, I have no scruple to add the authority of my opinion to his; and if that case had come before me in a court of appeal in 1775, when it was pronounced, it would have been in

possible for me to have given my assent to the judgment of the Court in that case, reversing the judgment of the Lord Ordinary. I see the Lord Justice Clerk Miller says in that case, as a ground of his opinion, in which the majority of the Court concurred, that as the granter might have burdened his estate to the full amount of its value, he might therefore give it to the disponee under the deathbed deed. But I by no means coincide with the doctrine, that because you may do a thing in one mode, therefore you may do it in any mode.

1806.
CRACFURD, &c.
v.
COUTTS.

"It is perfectly settled in this country, that in a will devising land, which must be executed in the presence of three witnesses, you cannot reserve a power to devise any part of it by a will executed in the presence of two witnesses only. We may devise land by will, to be charged with legacies, or to trustees to pay such sums of money as the testator may direct. Such legacies may be granted, or directions given in any writing, executed before two witnesses, or without witnesses. Where the land is already vested, even the witnesses to the will may take as legatees to the whole value of the land. But not one particle of the land can be devised, by our law, but by a will in the presence of three witnesses.

"But this distinction goes a great deal further; though the whole value of the land may be given in legacies, yet, after giving legacies to a certain amount, the surplus cannot be given away in this manner. The surplus is held to be the land, and is not thus to be disposed of. These cases strongly prove the distinction between a power of giving by a certain mode, and giving by any mode.

"Though I have said thus much of the case of *Rowan v. Alexander*, it is, in my opinion, a very different thing to say what might have been done with regard to it in 1775, and what ought now to be done at this day. It would not be on any dry reasoning that I should disturb the weight of this case, as applying to another in 1793, if they coincided.

"In the present case, I think that the reasons of the judges, in the Court below, altogether amount to this, that it was the testator's purpose to bestow the estates on Mr. Coutts by the last deed; and that he did not do so if he did not keep alive the former deed; they held that the deed of 1793 only revoked the former deed, to the end of giving effect to the latter one.

"If it be asked, what it was he did not mean to revoke? I understand that he did not mean to revoke that which gave a right to the disponee in the deed of 1771 to adjudge from the heir-at-law, if the disponee in the second deed should refuse to take.

"If Mr. Coutts should be unwilling to take under the deed of 1793, is there a right under the deed of 1771 to adjudge the *hereditas* against the heir? If such a right would not exist under the deed of 1771, under what pretence does that deed exist to bar the right of the heir?

"Whatever I might have been disposed to decide in such a case

1806. as that of Rowan against Alexander in 1775, I should be one of the last men in the world, in 1806, to disturb that decided case, in so far as it applies to a case of implied revocation.

CRAUFURD, & C.
v.
COUTTS. “It appears, from what was said by Lord Loughborough, that these noble Lords inclined to consider this as a case of fraud on the law of deathbed. My view of it is different, that this is not a case of fraud, and that the appellants’ case cannot be made out on that ground.

(His Lordship afterwards briefly stated the case of *Hearle v. Greenbank*, 3 Atkyn’s, p. 695, mentioned in the note of Lord Loughborough’s speech.)

“That noble Lord concluded with saying, that he was afraid a reversal of the judgment of the Court, then under consideration, might trench upon the system established with regard to those trust bonds to which I have alluded, and therefore he thought it better to send it back to be reconsidered. He added, that Lord Thurlow and himself were of opinion, that it might be proper, to prevent all question upon these trust bonds, by an act of Parliament declaratory of the law.

“It appears to me that this case may be decided without touching any of these trust bonds.

“The cause was accordingly remitted to the Court of Session, where it underwent the most painful and minute reconsideration. I think I never saw a more honourable specimen of judicial ability than occurred in the discussion of this case, when they formed the opinion on which this second appeal arises.

“They reconsidered this case in all the points of view in which it had been taken up; in regard to the alleged fraud upon the law of deathbed; the whole principle of that law, and the particular facts and circumstances of the case. They at length narrowed the case very much from what had formerly been discussed, and put it upon what, I think, is its true merits, the effect of the second deed upon the first, through the clause of revocation.

“They agree that if the deed of 1771 was cancelled, or wholly revoked, by executing another instrument, if the right of the heir was let in *pro brevissimo intervallo*, that the deed on deathbed would operate nothing.

“A narrow majority of the Court held, that under the deed of 1793 the deed of 1771 was not revoked absolutely, but under a qualification; and they therefore held, that if the deathbed deed of 1793 was challenged by the heir (for a deathbed deed is not in any view a nullity, but only liable to effectual challenge by the heir), the disponent under it might found on the prior deed in 1771, and insist with effect that the heir had no interest to challenge the latter deed; that, if it was set aside, Sir Robert Craufurd would have, as we should say in this country, a right to the estate, or as they would say in Scotland, would have a personal right of action to obtain the estate.

“ The new question in this case therefore, is, whether or not, in a reduction brought by the heir of the deathbed deed of 1793, her claims could be repelled by any thing the disponee under it could urge upon the deed of 1771, as at the death of the granter? If he could so repel the claims of the heir, he must prevail in the action; if he could not, then the present appeal would be well founded.

1806.

CRAUFORD, & C.
v.
COURTS.

“ This question will still necessarily lead me into a discussion of some length; and I wish to reserve this till Tuesday, when I shall state my final opinion upon this case. If I be in an error thereon, I must say that it is conformable to the first views I have formed of the case, and that, with all the light since thrown upon it, my opinion has never varied with regard to it.”

12th March 1806, case resumed.

(After reverting to the opinion delivered in part by him on a former day,)

LORD ELDON said,

“ The questions in this case were anxiously discussed and considered both before and after it was remitted to the Court below by noble Lords, some of whom are now no more. One of these noble Lords (Rosslyn) entertained but one unqualified opinion upon the subject throughout. He held, that the settlement 1793 was a fraud upon the law of deathbed, and that deed was an unqualified revocation of the deed executed in 1771. His Lordship therefore observed in strong, although not in legally accurate language, that it was impossible to splice two nullities, in order to make one effectual deed of disposition. This expression was not technically correct, inasmuch as the term nullity could not be applied with strict precision to the deathbed deed, because it was, *prima facie*, a good deed, and was alone reducible by the heir, who was *alioqui successurus*. But his Lordship’s meaning was this, that the first deed being revoked, was an absolute nullity, and as the deathbed deed could not knit itself upon the first, it was a nullity likewise in the popular sense of the word, as it could convey nothing.

“ Such were the sentiments of the noble Lord, and which coincided with those of several judges in the Court below, and were supported there by very strong arguments.

“ Another noble Lord, who is also now no more, (Lord Alvanley), seemed to regard the question in another view. So far as I could collect his sentiments, he did not consider the deathbed deed as an evasion of the law of deathbed, nor the *liege poustie* deed as altogether revoked by it; but his Lordship seemed to be of opinion that the first deed was to be considered as in existence to a certain effect, and he thought that we should look at the effect of the two

1806. instruments taken together, and construe them, so as that a disposition,
 ————— which the disponent had a clear power to make, might be supported,
 CRAUFURD, & C. and that the manner in which he did so was to be regarded as mat-
 v. ter of form, and not of substance.
 COUTTS.

“ But to this last sentiment I never can agree. I entirely concurred with the noble Lord, whom I have mentioned, that matter of form in conveyancing is matter of substance, and that it is not sufficient that a person should have power, and an intention to dispose of his property, but that, in order to render it effectual, he must execute it *habili modo*, or, in other words, he must execute it in the form, and with the solemnities prescribed by law for conveying such property.

“ The case of *Rowan v. Alexander*, which I shall have occasion to remark upon more particularly hereafter, was more relied upon in the argument than I think it can well be. It was relied on in that case, and has been argued here, that the party might have given the value of the estate by a deathbed deed; and why, therefore, not give the substance or land itself? But this is not so by the law of Scotland, any more than it is by the law of England. By the law of England, a will executed before three witnesses is necessary to convey land; and if land is so conveyed, it may be afterwards charged by a will which is not so executed. But, it by no means follows, that because the total value of the estate could be conveyed in the way of a charge, although not attested, that therefore the land itself could be so conveyed. Your Lordships know very well, that even the surplus money arising from the sale of land, cannot pass without a will attested by three witnesses, because a court of Equity considers that as land.

“ It has been also said, that if a person means to revoke an instrument, with reference to a particular purpose, if that purpose is not effected, the original instrument is not revoked.

“ This proposition is, to a certain extent, true; and it is to be understood with various limitations and distinctions. It is true, that if a party sits down, meaning to revoke a disposition of his property, and by the same act, or as it is called, *unico contextu*, to make a new one, if he makes the revocation, but dies before he has completed his new disposition, he shall not be held to have revoked his former disposition, because his revoking it was but part of his purpose, and his act was incomplete.

“ But if he completed his purpose by a new disposition, the first is revoked, however inadequate such new disposition may be to convey his property. Thus if, having made a will of land, I afterwards make another, in which I revoke it, and give my land to a monk or an alien, the revocation is good, although the devise is void, because the purpose was complete, so far as it was in my power to complete it. In the present case, the purpose of the party to dispoise his

lands anew was complete, which decides the case with reference to this argument.

1800.

“ A good deal has been said on the doctrine of approbate and reprobate, and that it barred the heir from claiming in this case. I have made a good deal of inquiry into the grounds of the decision, to see if it went upon that ground, and if so, how it could be maintained upon it.

CRAUFURD, & C.
v.
COUTTS.

“ I think this is not a case where the doctrine of approbate and reprobate will apply. The heir does not claim under the deathbed deed. The heir says, ‘ Your deed does not give you a title unless you can show me a deed executed in *liege poustie*, existing at the death of the granter. If there be no such deed, the deed executed on deathbed is gone.

“ The question is, Is there enough contained in the deathbed deed to prove that no *liege poustie* deed existed at the death of the granter? And I shall here detail the principles on which my opinion is founded.

“ In various cases, which I need not at present specially mention, this deathbed has been held to be good. The law of deathbed has been so far altered, that a person may, by certain modes, give away his estate by a deed on deathbed. Upon this point, as well as upon the practice which has prevailed with regard to trust bonds, we cannot shake the cases without great danger to private property. In our own law, we have instances also of a similar kind, in the practice with regard to the barring of estates tail, and the making of conveyances to enable a person to give legacies without regard to the statute of frauds.

“ If, by inveterate usage and practice, you find men’s titles standing, in a certain way, you will support them to the extent of the usage ; but it is very different to say that you should carry them beyond it.

“ It is admitted, that if a valid *liege poustie* deed existed at the death of the granter, the deathbed deed would also be good. It is to be observed, however, that this *liege poustie* deed must be in favour of a stranger, and not in favour of the heir *alioqui successurus*. A deed in his favour would be held to be an evasion of the law, and not effectual.

“ This is obvious in principle, the stranger disponee is bound to hold good any power reserved against him ; if such power be duly executed, he cannot complain. This seems also to have been admitted by all the judges, except those who decided against Mr. Coutts, on the ground of its being an evasion of the law.

“ It is clear that Colonel Craufurd meant to give the estate to Mr. Coutts ; his power of doing so is also clear. In treating this matter, I deem it better to go upon the dry points of law, than to consider if it was more fit in Colonel Craufurd to prefer the nearest branch of an ancient family, or to give his estate to that deserving gentleman,

1806. Mr. Coutts. The intention and power of the testator are both admitted.
 CRAUFURD, &c.
 v.
 COUTTS. “The only question is, Has he executed that intention by effectual means? It is admitted on all hands, that Colonel Craufurd might have charged the estate vested in the granter of the *liege poustie* deed to its full value in favour of Mr. Coutts; or he might have directed him to convey that estate to Mr. Coutts. Both go to this, that the testator, in doing so, goes in affirmance of the estate vested by the *liege poustie* deed, for the person to take by the deathbed deed could not call upon the disponee under the former deed, to denude, unless the estate was vested in him. The author of the deathbed deed, in such a case, though far from revoking, asserts the validity of the *liege poustie* deed.

“Such cases are not authorities for the present decision, unless you could say that Sir Robert Craufurd had some estate under the deed of 1771, of which he could denude himself in Mr. Coutts’ favour, or which Mr. Coutts could have adjudged. But it is impossible to say that he had such estate of which he could denude himself, or which could be adjudged, if it can be made out on the construction of the deathbed deed that such estate did not remain in him.

“Your Lordships know that in Scotland the maxim of *mortuus sasil vivum* does not obtain as it does in this country. A proceeding in that country to take up the *hæreditas jacens* is rather against the estate than the person; the right can be made effectual directly upon the estate, if constituted by a deed containing procuratory and precept by an adjudication in implement. I say this, to prevent any misunderstanding of the language which I use.

“Another case was put: it was stated that the testator might have rendered the deathbed deed valid by a clause in it that he meant the deed of 1771 to subsist, if the deathbed deed was found to be ineffectual. I do not mean to deny this. He would then have said, if my deathbed deed is not good, or if the disponee under it would not or could not take, from popery or other cause, then the disponee under the deed of 1771 might have said to the heir *alioqui successurus*, ‘the estate is mine.’ And he might have proceeded to connect himself with it by his procuratory and precept; or if none had been contained in his deed, by adjudications as before mentioned.

“In that case, this would be the express meaning of the testator: ‘I keep alive the former deed for all those purposes, to enable the disponee in the deathbed deed, to say to the heir, that he has no interest to impugn the deathbed deed.’

“When I considered the cases of implied revocation, (and I have never considered any question more deeply than the present,) I am free to say, that I never could have assented to affirm the case of Rowan v. Alexander, if brought before me by appeal at the time it was pronounced. Lord Rosslyn stated, when this cause was first here, that he could not give his assent to that case. But there is a

mighty difference between what might have been fit and proper to be done when that case was recent, and what may now at this day be fit and proper thereon. No man can say that many titles may not rest on the principle of that case of *Rowan v. Alexander*, and, were we to touch that case, we might shake securities, in the validity of which there had been great confidence for many years.

1806.

CRAUFURD, &c.
v.
COUTTS.

"I allude to the trust bonds, which had been devised and approved by the most eminent persons on the bench in Scotland.

"In that case of *Rowan against Alexander*, a false principle was laid down on the bench, that, because the testator could have validly given the value of his estate in money, therefore the disposition of it was good. It was said, in that case, that there was no express revocation; but it is difficult to perceive what could be a more express revocation than giving the estate wholly to another.

"That case must now be held to stand upon this principle, that the testator did not mean the former deed to be revoked, unless the second deed was found to be good; and, expressing nothing as to a revocation of the former deed, he must be held to have meant in effect that both should stand to accomplish the purpose he wanted, of giving the estate to the donee in the last deed. This would apply also to the case of the donee under the second deed being unwilling to take, or incapable of taking.

"But the same principle will not apply to a case of express revocation. This is the first instance where the principle has been so applied. It is unnecessary to enter into the cases of *Birkmire, &c.* which are different from the present, in the revocations being by different instruments.

Finlay v.
Birkmire, 29
July 1779.
Mor. p. 3188.

"In the present case, as appears to me, there are only two questions; 1st. Is the disposition of 1771 revoked entirely? 2d. Is it revoked *ad hunc effectum*, or *ad omnes effectos*, quoad this species of question?

"The cases of express revocation prove, and the decision in this action with regard to the estate of *Monkland*, is the strongest of them all, that if the heir is let in *pro brevissimo intervallo*, the intention, or power of the granter signifies nothing, though he had half a dozen ways of giving away his estate upon deathbed, it signifies nothing, if this be not done *habili modo*. The cases of the destruction of the *liege poustie* deed, though cancelled only to execute another deed; or the revocation by an instrument, when a new deed was next moment executed, clearly show this, that what may be done validly in one mode cannot be so in any mode.

"In the case of *Monkland*, the Court seems to have had considerable difficulty with their own decision; more indeed than I feel with regard to it. The disposition of *Monkland* was by a different deed from that of *Craufurdland*. The former disposition of *Monkland* was revoked, that Colonel *Craufurd* might dispose of it by a sale; and, on same date, he executed a disposition to Mr. *Coutts*,

1806. by such mode of sale ; but, before completing this purpose, Colonel
 CRAUFURD, & C. Craufurd died. We see here strongly that the power to give away
 v. in certain modes, and the intention, are nothing. The Court, in
 COUTTS. their judgment, declared that it was the testator's purpose to give to
 Mr. Coutts, but they found (in terms too general to reconcile that
 decision with the decision with regard to Craufurdland) that the
 deed of 1793 had revoked the deed of 1771, and therefore they
 give the estate to the heir.

" It is clear, in this country, where an estate can only be devised
 by a will, executed in the presence of three witnesses, that in such
 will a person cannot reserve power to make a valid devise of his
 estate by will before fewer witnesses. All the doctrines connected

Habergham v. with this were much canvassed in the case of Habergham against
 Vincent, 1793, Vincent. A person in this country cannot, by the medium of a will
 4 Brown's or deed, reserve to himself powers contrary to law.

Ch. Ca. 355, " In Scotland, no man could make a valid *liege poustie* deed in
 S. C. 2 Vesey, this form : ' Know all men by these presents, that I do hereby re-
 Jun. 204. serve a power to dispose of my estate, at any time of my life, &
 ' *etiam in articulo mortis*. ' And if this *liege poustie* deed is itself to
 have any effect at all, it must be some actual deed of disposition, ex-
 isting at the death of the granter.

" Put the case that Mr. Coutts had repudiated the disposition in his
 favour, contained in the deed of 1793, could the heir under the deed
 of 1771 have made use of his procuratory and precept to attach him-
 self to the *hereditas jacens* ? or if there had been none such, could he
 have used an adjudication in implement against the estate ? This
 question depends upon the fact, whether the deed of 1771 was re-
 voked by the deed of 1793 or not. If the testator left the deed of
 1771 a subsisting deed, the donee under the deathbed deed might
 make use of that shield to protect himself against the heir-at-law.
 In order to find that this case can be ruled by the decision in Rowan
 against Alexander, you must find the direct contrary of what the tes-
 tator has expressed in the present case."

" The deed of 1771 was a deed standing by itself, containing a
 procuratory and precept, and all the usual clauses of style. Let us see
 what the testator does or says with regard to this deed ; does he say
 that the deed of 1771 shall stand if the deed of 1793 is found not to
 be good ? does he substitute Mr. Coutts in the room of the donee
 under the deed of 1771 ? He does no such thing. The dispositive
 part of the deed of 1771, the procuratory and precept, are all revoked,
 and the deed of 1793 is made a complete disposition, standing
 solely by itself, containing a new procuratory and precept, and other
 usual clauses. It also contains the clause upon which this whole
 question turns. (Here his Lordship read the clause of revocation.)

" The question of construction, as to what the testator has said,
 arises upon this :—He says, I do not intend that the donee in the
 deed of 1771 shall take, nor that the deed of 1771 shall be kept

alive, and that the disponee therein shall denude in favour of Mr. Coutts ; but I do expressly revoke that deed, so far as conceived in favour of the persons to whom it is granted, and I keep it alive only with regard to the powers to alter, innovate, and revoke, therein contained, thereby reducing the deed to nothing but one containing a power to alter and revoke.

1800.

CRAUFORD, & C.
v.
COUTTS.

" I never, in this case, could bring my mind to any other opinion, than that the deed of 1793 reduced the deed of 1771 to a conveyance in favour of the heir *alioqui successurus* ; because, if the intermediate disposition was destroyed, the right of the heir to claim the estate was again set up. Any other opinion goes to make the deed of 1793 good by itself, which is illegal and impossible.

" I put another question to myself, which I hope will free me from any charge of mistaking the law. I cannot conceive that the deed of 1793 would do, whether it contained an express or implied revocation of the former deed, unless I were able to say, that if Mr. Coutts could not or would not take, some right to take up the *hereditas jacens* under the deed of 1771 would still remain. Now such right could not remain under the deed of 1771, because the revocation goes to everything but what is therein excepted. How could a personal right of action be made out in the disponee under the deed of 1771, as the deed of 1793 absolutely revokes that deed, so far as containing any disposition ?

" The case turns entirely on the true construction of this part of this instrument ; it destroys all right granted under the former deed, without which, the reserved powers to alter were vain.

" In the opinion which I have formed, I have the misfortune to differ from many persons in the Court of Session, of whom I am bound to say, that if I have been of any use in matters of Scotch law, I owe it to them ; but I have also the satisfaction to agree with many others in that Court, and with some who heard the case argued in this House.

" I repeat, that this is a question of construction only, and that all apprehension may be dismissed of its touching any title to estates, or any other decided case ; the present case turning upon another point, and neither upon any general or special construction of the law. I shall defer giving in the judgment which I mean to move in this case till to-morrow, contenting myself at present with stating this conclusion, that the heir *alioqui successurus* has both a title and an interest in this case."

Next day his Lordship moved the following judgment :—

The Lords find, that in this case, the question, Whether the heir hath a title and interest to challenge the deed of 1793, as made upon deathbed, depends upon the particular nature and effect of the deed 1793, regard being had to the particular terms of the deed, as expressing the same to be a revocation, and recalling of

1806.

CRAUFURD, & C.

v.

COUTTS.



all former dispositions ; and find that the deed 177 though executed in *liege poustie*, ought not to be considered as being, at the death of Colonel Craufurd, such a subsisting valid instrument or disposition, executed in *liege poustie*, as that thereby the interest of the heir to challenge the deed of 1793 as to the lands by the same deed disposed to the defender Thomas Coutts, should be deemed to be barred, inasmuch as the latter deed contains, in terms of the most express revocation of all former dispositions, assignations, and other deeds of a testamentary nature, formerly made and granted to whatever person or persons preceeding the date thereof, and particularly the deed granted in the year 1771, and contains the most express declaration in terms, that such deeds are to be void and null, so far as they are conceived in favour of the persons to whom they are granted ; and also find that although the deed of 1793 contains a declaration that the former deeds should be valid and sufficient to the extent of the powers therein reserved, to revoke, alter, or innovate the same, to the effect only of making the deed of 1793 effectual in favour of the said Thomas Coutts, such declaration ought not to be taken as the ground of an implication, rendering such former deeds valid or effectual beyond the extent in which they are in express terms declared to be made the ground of a construction, whereby such former deeds should be held to be valid or sufficient, in any respect in which they are, by the same deed, in express terms, declared to be null and void ; and find, that although such declaration was made in the deed of 1793, asserting the validity of the former deeds to the extent of such powers, all the dispositions in the former deeds having been revoked in express terms, there did not, according to the true effect of all the deeds taken together at the death of Colonel Craufurd, under any part of the former dispositions, so expressly declared to be null and void, exist in any persons named in such former deeds, any personal or other right in the lands by the deed of 1793, disposed to the defender, secure against the challenge of the heir *ex capite lecti*, on which the disponee *in lecto* under the deed of 1793 could be entitled to found, as his defence, against the reduction of the deed made *in lecto*. And find, that as the deeds in this case are conceived as to the terms thereof, the disponee

under the deed 1793 cannot be considered as having title or right, under the former disposition, as if they had been named therein, or otherwise under the effect thereof; and find, likewise, that the heir is not excluded, in this case, from challenging the deed 1793 *ex capite lecti*, and at sametime founding thereon as revoking the former dispositions. And it is therefore ordered and adjudged that the interlocutors complained of, so far as they are inconsistent with these findings, be reversed. And it is further ordered that the cause be remitted to the Court of Session to do therein as shall be meet.

1806.

HOWIE
v.
MERRY.

For Appellants, *R. Dundas, Ad. Rolland, Robert Craigie.*
For Respondents, *Wm. Adam, Wm. Robertson.*

(Mor. App. I. "Writ" No. 3.)

JOHN HOWIE,	-	-	-	<i>Appellant;</i>
JAMES MERRY,	-	-	-	<i>Respondent.</i>

House of Lords, 17th March 1806.

DEATHBED—DEED—VITIATION IN ESSENTIALIBUS—PAROLE.—(1.)

A deed was challenged on the ground of deathbed and incapacity, by a party not the heir-at-law, but by one to whom the same subject had been disposed by a previous deed. Held him entitled to challenge on deathbed. (2.) This deed, in order to get over the objection of deathbed, had been vitiated and altered in its date, and a proof being allowed, held that the deed challenged being vitiated, and its date false, was null and void. (3.) Observed that the want of the date here could not be supplied by parole, and still less the vitiation of a date.

John Howie, proprietor of certain lands, resolving to convey these to the appellant and respondent in two moieties, executed a disposition in 1777 in favour of each: But thereafter, and by a disposition of this date, he conveyed the whole two moieties to the appellant, without revoking or taking any notice of the former disposition. He died two days thereafter, whereupon the appellant took possession of his estate. Jan. 6, 1785.

Action of reduction was brought by the respondent, in so far as concerned the one half of the lands conveyed to him

1806. by the disposition 1777, to set aside the latter disposition of 6th January 1785, on the ground, 1st, That the disposition which was originally dated 6th Jan. 1785, was null and void, as being vitiated *in essentialibus*, the date of the same having been fraudulently changed after the death of the deceased, from 6th January 1785 to 6th November 1784 in order to exempt it from challenge on the head of deathbed and incapacity; and, 2d, That the deed was executed on deathbed, and while the deceased was incapable of judging of its nature and import.
- Feb. 6 and 7, 1801. After a proof, the Lords, of this date, “Sustain the request of the pursuer, and reduce, improve, decern, and declare, in terms of the conclusions of the libel: Find that the pursuer (respondent) entitled to expenses,” &c. On two reclaiming petitions the same were refused.
- Feb. 27, and May 15, 1801.

Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said,—“The testator died on the 9th January. The parties are agreed as to this. The deed 1777 required no delivery. The liferent right was reserved. It contained a power to revoke, but, being deposited in the hands of a friend, might have been called back and destroyed, or defeated during the joint lives of husband and wife, and by their joint act, but not after the death of the husband. The deed 1784 contains no clause of revocation, nor any reference to the former deed. If the first deed is not sustained, it must only be by virtual revocation, and, in consequence of sustaining the last, and holding it as of a posterior date, as executed by a party having right to execute it. The vitiation of the date is, in my opinion, an insuperable objection. But I am not clear that he was in a condition to make a deed on 6th January, for the witnesses clearly refer his capacity to a preceding period.

“The title is made up on one half of the subject, under the former deed, by sasine 5th September 1785. Sasine expedite by William Dunn, notary public. Sasine taken upon the challenged deed on 11th Jan. 1790, William Nimmo, notary public. The widow was still alive. If there was only one settlement, the date would be less material. But if there be two, it is essential. Besides, it is a check against forgery and *false evidence*. All the witnesses here except Dunn, are swearing upon a wrong hypothesis, and Dunn is a stranger to the testator. Besides, he would naturally incline to support the deed. I think the want of the date here cannot be supported by parole evidence, and still less the vitiation of a date. The legatees in former deeds are also interested parties; and our *nobili officia* cannot be exerted to restore this party against his own fraud in vitiating the date. No doubt, the word eighty is not vitiated, and the

Against these interlocutors the present appeal was brought to the House of Lords.

1806.

Pleaded for the Appellant.—The deed in question could only be reduced on the head of deathbed by the heir-at-law; but as all right of succession in the heir-at-law was previously excluded by a special deed of conveyance of the lands in question to strangers, he could not interfere; and those strangers cannot avail themselves of a challenge on deathbed, which is peculiar alone to the heir. The respondent has no title, therefore, to maintain the present action. The deed under challenge was deliberately executed, and having specially conveyed to the appellant what was conveyed formerly to the respondent, this must be held as an implied revocation of the former deed. And as the heir-at-law has confirmed the last deed, the respondent cannot be heard to challenge. Besides, if the deed was vitiated, it was done by the respondent and not the appellant; and there is no evidence to show that the deed does not bear its true date, viz. 6th Nov. 1784; nor that the granter was under any incapacity, at that time, far less that the deed is reducible on the head of deathbed.

HOWIE
v.
MERRY.

Pleaded for the Respondent.—The respondent's title and interest to sue this action is placed beyond all doubt by the disposition of 1777 conveying to him the one half of the property. This deed was irrevocable in its nature, as it contained warranty against all subsequent deeds of the granter. The deed was actually delivered, and infeftment taken upon it. But even supposing the deed merely testamentary, and revocable in its nature, it must stand good until revoked;

is material; but still a partial manufacture must have been for a fraudulent purpose, and if we cannot restore the date fully, it must be held as a null date altogether, especially where the time is material in the question of deathbed; or it is made a question whether the maker at that time was of good health, or of sound mind. A holograph deed is held to be executed at the last moment of life. This cannot be in a better situation. Holograph deeds could not, by parole evidence, be brought back to a former date, *e. g.* in a question of deathbed."

LORD HERMAND.—"The pursuer has made out his case, 1. Because the first deed was delivered; and, 2. Because the second deed was vitiated in the testing clause, and the date clearly false."

LORD JUSTICE CLERK.—"I am of the same opinion."

LORD MEADOWBANK.—"I am of the same opinion."

Lord President Campbell's Session Papers.

1806. and this can only be by express revocation, or by im-
 ——— revocation, neither of which applies to the present ca-
 GLASSELL The proof adduced shows that the deed sought to be
 v. duced had at one time a different date from that which
 EARL OF bears. *Ex facie* it appears manifestly erased, and not to
 WEMYSS. the true date, and the true question is, Whether a de-
 vitiated or altered with a fraudulent intent, after executi-
 and after the death of the granter, can be set up as
 deed of that person? or can be used by the perpetrator
 the fraud? The respondent maintains that, in the face
 the proof adduced, this deed has been vitiated, and alte-
 in its date, to serve a fraudulent purpose, as it clearly
 appears from the evidence of Dunn, the writer of the de-
 and from the law charges in his books, that it was execu-
 on 6th Jan. 1785, two days before the granter's death.

After hearing counsel, it was
 Ordered and adjudged that the interlocutors complai-
 of be, and the same are hereby affirmed.

For Appellant, *John Hagart, M. Nolan.*
 For Respondent, *Ar. Campbell, James Grahame, &*
Hors

JOHN GLASSELL of Long Niddry,	-	-	<i>Appellan</i>
EARL OF WEMYSS,	-	-	<i>Responde</i>

House of Lords, 22d March 1806.

SALE OF LAND—BOUNDARIES—PLAN—PAROLE.—In a judicial
 of land by lots, the articles of roup gave a different description
 the boundaries than was contained in the plan prepared for
 sale, and which marked out the boundaries. It was stated,
 the judicial proceedings in the sale, specially referred to the p-
 of the estates. Parole proof was allowed, in which the sur-
 were examined, though it was contended that the description o-
 boundaries, as contained in the articles of roup, could not be
 fected by those plans and such proof: Held that the old bound-
 as contained in the title deeds, and these plans, was the march
 tween the parties.

The baronies of Long Niddry and of Seton, along v-
 other extensive estates, belonged to the York Build-
 Company, were sold by judicial sale in lots, particul-
 described in the articles of sale, in the year 1779.

The appellant purchased the first lot of Long Nid-

and the respondent afterwards acquired the first and second lots of Seton; and the present question arose between the proprietors of Long Niddry and lot first of Seton, which estates marched with each other, as to what was the boundary between these estates, as set forth and described in their rights, and whether the one had encroached on the property of the other.

In the judicial sale of these estates, the lands in question were divided, with a plan of the boundaries drawn up as to each, and the true measurements of the same prepared. From the description of the subjects published in the advertisements and in the papers distributed at the sale, it was alleged, that the stream or burn called Long Niddry Den-Burn was stated to be the boundary or march between the appellant's lot or estate of Long Niddry, and the respondent's estate of Seton (Lot 1st of Seton).

Formerly there had been a different boundary of the two estates, having different landmarks, and giving to the proprietor of Seton (Lot 1st) some acres or two on the Niddry side of the burn. But the appellant alleged that the proper rights of parties must be regulated by the articles of sale; and founded on these, to show, from the description of both estates, that his property was encroached on by the respondent, and that the proper boundary between them was the Long Niddry Den-Burn, conform to the advertisement of the estate.

By the articles of sale, Long Niddry was described as follows: "The first lot of the barony of Long Niddry, comprehending the whole town of Long Niddry, and all below the road from Seton to Haddington, which road makes the south boundary with the fourth lot; the Water Gang, and the vestige of an old dyke, upon the west side of the common, and line northward, till its junction with Gossford Burn, divides it from the second and third lots. The sea is the march on the north, from Gossford Burn to the burn of Long Niddry Den, which is the west boundary." Thus the burn of Long Niddry Den was the boundary on the west. All on the east of the burn being the respondent's estate of Seton, (Lot 1,) "comprehending Seton ruins, with the gardens, parks, and village, the mills of Seton, and mill-lands, together with the East and West Mains, extending from the Den, at the march with Long Niddry to the Fishergate road; which den and road form the east and west boundaries of this lot; and line from the

1806.

GLASSELL
v.
EARL OF
WEMYSS.

1806.

GLASSSELL,

v.

EARL OF
WEMYSS.

“ direction of the said road by Maiden Bridge, through the
 “ Links to the sea, which makes the north boundary. The
 “ great road betwixt Long Niddry and Preston, along the
 “ dykes of St. Germans and parks of Seton, is the march of
 “ the south; and along the said road till its junction with
 “ the road at Milldam, leading by the west end of Seton vil-
 “ lage, and eastward to Fishergate as above.”

The respondent claimed several acres on the west side of the burn, as well as all on the *east* side, on the ground that the appellant had caused to be altered the original channel of the burn, which he said was made to run considerably westward of the present course or channel. The appellant denying this fact, contended that the burn was the natural boundary between the two properties—that though his own tenants, in ignorance of this, had allowed the tenants of the respondent to possess beyond the burn, and on the Niddry side, for several years, yet that he was now entitled to have this declared an infringement on his property.

Mutual declarators having been brought and conjoined, the Lord Ordinary allowed a proof to both parties. Upon considering which, the Lord Ordinary, adopting the ancient march boundary, pronounced this interlocutor:—

July 4, 1800. “ Find, that the line shaded red on the plan, which runs along
 “ the bank on the east of the Den-Burn, from the St. Germans road, north to the letter A, and from thence westward
 “ to another letter A, at the old bridge, is the march between
 “ the respective properties of the said parties in that quarter. Find, That from the old bridge, northward to the
 “ sea, the green line described on the plan, as the vestige of
 “ the old road and burn, and the continuation thereof
 “ marked with the letter A, is the march in that part; and
 “ decern and declare accordingly; but supersede execution
 “ till the third sederunt day of November next.” On re-
 claiming petition, praying for the examination of Crauford
 a land-surveyor, whose evidence was sought, and the transmission of a deposition emitted by Mr. John Home, another
 land-surveyor, which being allowed, the Court pronounced

June 25, 1801. “ this interlocutor:—Find, the march between the respective
 “ properties of the said parties is, as delineated on the
 “ plan of said lands, made out by John Home, land-surveyor,
 “ and described by a line shaded red on said plan along the
 “ boundaries; and decern and declare accordingly. Refuse
 “ the desire of the petition of Mr. Glasssell; assoilzie the
 “ Earl of Wemyss from this process of declarator, and

1806.

 GLASSNELL
 v.
 EARL OF
 WEMYSS.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—This being a question relating to the property of land, must be regulated solely by the title-deeds of the parties, which show that the Den-Burn is the western boundary of the Long Niddry estate, purchased by the appellant. The plans cannot alter or remove the effect of the precise words made use of in the articles of sale, declaring the Den-Burn to be the march, and in virtue of which, and of the decree of the Court of Session, the appellant stands infest in the lands so described. Independently of this title, there is also the positive evidence of Mr. Hepburn, to whom the fixing of the boundaries of the different allotments was solely committed, that the Den-Burn was to be the march betwixt these two lots, and that no part of the lot of Long Niddry should be upon the west side of that burn, nor any part of the Seton lot on the east side of the burn. This was the understanding of all the surveyors, of Mr. Home and of Mr. Crauford, by the latter of whom, the Den-Burn on the plan was shaded red as the march between them. And the very principle upon which the Den-Burn is declared to be the march from the sea to the old bridge, necessarily leads to the conclusion that the burn must be the march the whole way between these two properties. The measurements too lead to the same conclusion.

Pleaded for the Respondent.—It is clear, from the evidence, that the present course of the Den-Burn, from the old bridge *down to the sea*, or northwards, is different from what it had been in the year 1779, when the properties were divided and sold to the appellant and the respondent; and the alteration of the course was occasioned partly by accident, but chiefly by operations executed by the appellant himself, and unauthorized. The estates of both parties were purchased at the same time, *according to certain plans*, upon which the boundary was distinctly laid down by a line to the eastward of the Den, from the old bridge over the burn at the bottom of the Den, southward to the St. Germans road. There were different plans; one of the barony of Seton, another of the barony of Long Niddry, a third of the Seton lot, now the respondent's; and a fourth, of the first lot of Long Niddry, which lot forms the appellant's estate; and the line of boundary appears in all of them precisely as the respondent concludes, and as the Court has

declared by the parts of the interlocutors complained of. The plan of the appellant's estate, containing that line, was delivered to him at the time of the purchase in 1779, and remained in his hands till produced by himself in the course of the present action. He cannot therefore be heard to set up a different boundary, because the description in the articles of sale, by mistake, set up a different boundary. The real boundary is that indicated by the plan; and if there was no less evidence of this than exists, the possession had would be sufficient of itself to decide the question, for the respondent has possessed, without interruption, the Den on both sides, and on the east side, up to the red line, on the plans 1779. And in regard to the measurement of the contents of the plans of Seton in 1779, and the different measurement of the same estate, made by Mr. Ainslie in 1796, showing that the former was less by fifteen acres than the latter, it was sufficient to say, that by the articles of sale, all deficiencies and errors in the mensuration of the lots and parcels were to be solely upon the risk and hazard of the purchasers.

After hearing counsel,

LORD CHANCELLOR ERSKINE said,

" My Lords,

" If there is not any reason, seen or apparent, to disturb this judgment of the Court of Session, (and as yet I have seen none), there is no ground to hear this case further. It frequently happens to courts of justice that their decisions may be wrong, from not being able to investigate facts at a remote distance of time. Therefore, they are obliged to have recourse to general rules and maxims of evidence.

" Hence the possession, after a lapse of time, is a material feature here; for the sale of both estates to the contending parties took place in 1779 at the same time.

" If the judgment below had tended to bring into doubt any rule with regard to the rights of real property in Scotland, or rights standing on infeftments, I would have heard the other side, and sifted the matter to the bottom, but that is not the case here.

" It happens every day, that estates are sold in lots; and it thence often becomes a difficulty to prepare the necessary deeds. It is difficult to give a different description of property in a deed. If you take highways or rivulets for boundaries, these change, and the boundaries are thus effaced. But nothing is so common as a reference to a plan, and to look to that plan in all such disputes. There every man has plain notice of his enjoyment.

1806.

GLASSSELL
v.
EARL OF
WEMYSS.

1806. " I can conceive, that such precise words may be used in a deed, that it would be impossible to mistake them, and thus such evidence of a plan be excluded, but it is quite impossible to come to such a conclusion in this case.

ALLAN
v.
DE VOZ, &c.

" This is the case of a judicial sale, and depends now, on the appellant's part, on the parole evidence, or the oath of the surveyor as to drawing the plan. Mr. B. Hepburn says, that when the plan is completed, it is usual to burn the protraction. Would you go back to the protraction after such a lapse of time ?

" Mr. Home says, all the protractions are gone. (Reads Mr. Glassell's deposition). In treating with his tenant, he has recourse to the plan. Then he sees the alteration of boundaries, taking place partly by accident, and partly by his own operations.

" I go on the whole evidence adduced ; and before we can do our duty, we must see if the judges below have done right.

" I think they have ; and that it is our duty to affirm."

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *Wm. Adam, John Clerk.*

For Respondents, *W. Alexander, Fra. Horner.*

NOTE.—Unreported in the Court of Session.

WILLIAM ALLAN, Merchant in Leith,	-	<i>Appellant ;</i>
CORNELIUS DE VOZ, Merchant in Hamburg,	}	<i>Respondents.</i>
Messrs. RAMSAY, WILLIAMSON & Co., Merchants in Leith, his Attorneys,		

House of Lords, 24th March 1806.

AGREEMENT—PERSONAL PROTECTION—SUSPENSION OF DECREE OF LORDS OF SESSION IN FORO CONTRADICTORIO—CAUTION DE JUDICIO SISTI.—All the creditors of a bankrupt, except one, agreed to grant a personal protection. In a suspension of a charge of the Court of Session, given upon a decree *in foro contradictorio*, Held, (1.) That a letter written by the respondent's attorney, did not, in its import, infer an agreement to grant a protection,—the conditions thereof not having been complied with ; and, (2.) That a suspension of a charge on such a decree could only be on consignment or caution,—and execution sisted upon condition of the defender's finding caution *de judicio sisti*, during the dependence of the action. On appeal, interlocutors affirmed.

The appellant having been indebted to the respondent, Mr. de Voz, in a large amount, the latter raised action in the Court of

Session, in his own name and that of Mr. Curtis, his attorney, who, though a foreigner, was then residing in Leith, for payment of his account. 1806.

ALLAN

v.

DE VOZ, &c.

Defences were lodged to this action, stating, 1st. That no power of attorney had been produced in Mr. Curtis' favour; and, 2dly. That even if produced, as Mr. Curtis was himself a foreigner, he was incapable of acting as an attorney for Mr. de Voz.

In the meantime, and before anything was done upon the summons and these defences, Mr. Curtis was authorized to write the following letter to the appellant, which is the foundation of the present action: "12th October 1801, Sir, I am instructed by Mr. de Voz to inform you, that if you will immediately desist in opposing his just demands, and come forward and answer them, to the extent of your ability, he will not only grant you his protection till matters are finally wound up; but will, upon your making a suitable atonement for the injury he has already sustained by your refractory conduct, and giving your solemn promise to mitigate his former and present losses, by small payments, as hereafter shall best suit your convenience, likewise give you a full and ample discharge, so that you may go on again unencumbered with the great load of debt now impending over you, and which, if not removed, must ever prevent your doing any good."

The appellant paid no regard to the above letter. He did not come forward to answer these demands to the extent of his ability. Nor did he desist in opposing the respondent's just demands. On the contrary, next session, when the above cause again proceeded, he appeared by counsel, and insisted in his defences, but the Court repelled these, and the respondent obtained decree on 13th November 1801. And he actually raised a counter action, alleging counter claims, and pleading compensation, which were unfounded.

On the other hand, it was stated by the appellant, that Mr. de Voz being the only creditor from whom he had any thing to fear in obtaining a settlement with his creditors, he at once agreed to the proposal contained in the above letter.

Meetings of his creditors were then called, and a trustee appointed. At these meetings Mr. Curtis attended. At last a sequestration was taken out, and, at the meeting of the creditors, all the creditors agreed to give the appellant a personal protection, with the exception of Mr. de Voz.

Soon thereafter, a charge on letters of horning was given

1806. for his debt of £3688, and the appellant brought a suspension, contending that, from the import of the above letter, there was an agreement to give the appellant "his protection till matters were finally wound up."
 ALLAN
 v.
 DE VOZ, &c.

The Lord Ordinary, after considering the bill, with answers and replies, and making a verbal report to the whole Lords, pronounced, of this date, the following interlocutor: "The Lord Ordinary having considered the bill, answers, replies, and writs produced, and advised with the Lords, refuses the bill, but sists execution for eight days, upon the complainer's immediately lodging caution *de judicio sisti*, not to leave this country during that time."

May 18, 1802.

On petition to the whole Lords, the Court refused the petition, "but sist execution, during the dependence of this question, upon the complainer immediately lodging caution *de judicio sisti*, to the amount of the debt, as to leaving the country during that time."

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—Mr. de Voz was bound to concur with the other creditors in granting to the appellant a personal protection, in terms of the letter written by his attorney, Mr. Curtis, at his desire, where, upon certain conditions to be fulfilled by him, it is said "he (Mr. de Voz) will grant you his protection till matters are finally wound up." It is plain, from this letter, that Mr. de Voz and Mr. Curtis knew that the appellant was insolvent; that they were desirous that he should no longer fight his way in his then labouring circumstances, but stop payment, and be directed by Mr. Curtis in the steps he was to pursue, in which case Mr. de Voz "will grant you his protection till matters are finally wound up." And he further adds, "he will give you a full and ample discharge, so that you may go on again unencumbered with the great load of debt now impending over you, and which, if not removed, must ever prevent your doing any good." And the actual conduct of Mr. Curtis puts the meaning beyond all doubt; he well knew that no settlement could take place without the concurrence of all the appellant's creditors, and a fair division among them; and, accordingly, at his desire, the appellant applied for a sequestration. The question, therefore, seems to be, Whether or not the appellant fulfilled the stipulations which were required of him, in terms of his missive? The first stipulation is, "If you will immediately desist in oppos-

"ing his just demands." This the appellant complied with, by not insisting any further in his own action, which, although not without foundation, was not supported by that written evidence which was necessary to insure success, and by stating no special defence against the respondent's demands. The second condition was, "to come forward and answer them to the extent of your ability." By this surely was not intended that the appellant was to give Mr. de Voz an undue preference. He has answered the demands of Mr. de Voz to the extent of his ability, and consistently with the principles of justice, by concurring in measures without delay, to have the effects equally divided among the creditors. Mr. de Voz and Mr. Curtis could mean nothing more, and indeed their intention is fully established by the proceedings that took place immediately upon this letter being granted.

1806.

 ALLAN
v.
DE VOZ, &c.

Pleaded for the Respondents.—A creditor cannot be deprived of his right to make use of lawful diligence for the recovery of a debt due to him, otherwise than by his own express obligation to grant his debtor a supersedere from such diligence. Now no such obligation is contained in the letter of the 12th of Oct. 1804, founded on by the appellant. In the letter Mr. Curtis merely says, that the respondent, upon certain conditions, will afford the appellant his protection. This general promise of indulgence referred to certain bills then due by the appellant to the respondent, but it neither did nor could have any reference to the decree now attempted to be suspended, which was not obtained until more than four months after the date of the letter. The obligation or promise contained in the letter above mentioned, taking it in the most liberal and favourable sense for the appellant, was at any rate a conditional promise or obligation; and it has been shown, that every condition attached to it was completely disregarded by the appellant. In order to entitle him to any benefit from this letter, it was necessary that the appellant should immediately desist in opposing the just demands of the respondent. But, subsequent to the date of the letter, the appellant continued, in the most obstinate manner, and upon most frivolous and unjust pretences, to oppose the demands. In the action at the respondent's instance, the appellant, if he meant to avail himself of this letter, should have allowed decree to be pronounced without opposition. But against

1806. ALLAN
v.
DE VOZ, &c.

that action the appellant not only protested in his original defences, but he had recourse to a new defence altogether by alleging that the respondent's claims were compensated by counter claims to a great extent, which he pretended to have against the respondent Mr. de Voz. And he raised an action at his own instance for making these alleged counter claims good, or at least for the purpose of more effectually opposing the respondent's just demands. It was further conditioned in the letter, that the appellant was to come forward and answer the respondent's demands to the extent of his ability. But although the appellant continued solvent for a considerable time thereafter, he never advanced a farthing to the respondent to account of the large balance due, and which ought to have been paid to him many months before. Besides, the appellant was charged on a decree by the Court of Session *in foro contradictorio*, but such decrees cannot by the law of Scotland, be suspended except upon payment made, or consignation offered, of the sum decreed for. This is enacted by the statute 1584, c. 139, confirmed by act of sederunt 29th Jan. 1650, the latter relaxing so far the rule of consignation as to admit the bill with "*sufficient caution*." But here, neither consignation nor caution had been offered.

After hearing counsel, it was
Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Wm. Adam, Henry D. Inglis.*
For Respondent, *Ad. Gillies, M. Nolan.*

NOTE.—Unreported in the Court of Session.

WM. ROSE	<i>Appellant ;</i>	1806.
EARL OF FIFE	<i>Respondent.</i>	ROSE
		v.
		EARL OF FIFE.

House of Lords, 25th April 1806.

FACTOR—REMUNERATION—DISCHARGE—LOCATIO OPERARUM.—A factor received a fixed salary named in his factory. He continued for thirty years to act ; and, on the duties being increased, the Earl converted the salary into a bond of annuity for life. During this whole period of his service, annual accounts were given in, including his salary of £100, and discharges mutually granted, without any other claim being made. In a claim made by him for remuneration for services unconnected with his factory, Held that he could not legally claim such remuneration.

This was a claim by Mr. Rose, the Earl of Fife's factor, made for remuneration for extra labour over and above the certain fixed allowance he had for the general management of the Earl's estates and affairs. The Earl seemed to be conscious that the factor was entitled to something over and above the small salary of £100. He had turned that salary into a bond of annuity for life. He had, in another deed, left him a legacy. Thereafter, he had granted a bond for £500 ; and, finally, this last and the legacy, were cancelled.

The Lord Ordinary pronounced this interlocutor, in Nov. 12, 1800.

which the whole circumstances of the case are set forth :

“ Finds that the pursuer (appellant), during the great number of years that he was in the employment of the defender, acted under factories renewed at different periods, with a fixed annual salary, which was regularly advanced, till at last it was fixed at £100 Sterling per annum, besides his maintenance at bed and board in the defender's family ; finds, that by the factory granted upon the 24th Jan. 1771, the power granted to the pursuer was so enlarged as to give him a very comprehensive and general management of the defender's whole estate ; and that upon the 10th of December 1772, the defender granted a bond of annuity to the pursuer, converting the salary allowed him as factor, into £100 per annum for life, whether he should remain in the defender's service or not ; finds, that during the whole period of his continuing in the defender's employment, accounts were yearly fitted and settled between them, and discharges mutually granted ; and, in these accounts, the pursuer was regularly credited for his said annual salary of £100, without mention or reservation of any claim for a further allowance, which the pur-

1800. "suer might suppose to be due to him on account of ex-
 "traordinary services, or that would lead the defender to
 "understand that any further recompense was expected ;
 ROSE
 v.
 EARL OF FIFE. "finds that, in these circumstances, it is to be presumed
 "that the pursuer rested satisfied with his salary converted
 "into an annuity for life, and with such other advantages
 "as he derived from his situation, or from the favour and
 "goodwill of the defender ; and, therefore, that whatever
 "were the services or merits of the pursuer, he has not
 "shown any sufficient legal grounds for supporting the
 "claim in which he now insists ; and, for these reasons,
 "sustains the defences, assoilzies the defender from the
 Nov. 2^d, 1800. "present action, and decerns." On four representations,
 Mar. 7, 1801. the only alteration made by the Lord Ordinary was, to re-
 May. 21, — serve right to claim the annuity of £100, and *quoad ultra*
 June 5, — adhered. On two several reclaiming petitions to the Court,
 Jan. 13, 1802. the Lords adhered. *
 Jan. 11, 1803.

* Opinions of the Judges :

LORD PRESIDENT CAMPBELL said :—" This is a question as to recom-
 pense for services, and whether these are discharged or not ? There
 is no express discharge, and, in the circumstances of the case, a dis-
 charge of these ought not be implied. The relative situation of the par-
 ties is, in my opinion, to be attended to. There was great address on
 the one side. Confidence and dependence on the other. Expecta-
 tions of future rewards being held out, how was the pursuer to act in
 such circumstances ? The deed of 1772 is of an ambiguous nature—
 an act of mere will, and it is difficult to say whether it be testamentary
 or *inter vivos*, or whether it is revocable or otherwise, whether it
 would have been the ground of an action or not, whether in full of
 salary, or in addition thereto. It is clearly not a settlement of ac-
 counts, suggested and signed by the whole parties. But, in the first
 place, it grants a salary, while Mr. Rose continued factor, which was
 to be during Lord Fife's pleasure. 2. A legacy, to take place at death,
 and so far is testamentary, upon narrative of regard, and, consequently,
 is good. If he was dismissed, there was to be nothing due between
 dismissal and Lord Fife's death. This last point of the deed is worth
 nothing, and would yield no price if carried to market, unless the
 explanation in a cancelled deed in his own possession can be admit-
 ted. The Lord Ordinary's fourth interlocutor reserves all defences
 against it. It is not given as a remuneration for services, but for
 love and favour ; and, supposing it had, it would have related mere-
 ly to his duty as manager of the estate only—not to extra trouble in
 the professional character of a law agent or political agent. The
 £500 bond afterwards executed, seems to me to have been meant
 for this, but it is now cancelled. In short, the pursuer goes on unre-
 warded for his services, and gets less than any country procurator

Against these interlocutors the present appeal was brought to the House of Lords. 1806.

Pleaded for the Appellant.—1. When a professional man is employed to do the duties of his profession, and to bestow his skill, his labour, and his time, for the benefit of another, the contract of *locatio operarum* is formed between them. There is no occasion for an express deed to bind them; the employment of itself, with the undertaking on the part of him whose services are made use of, necessarily imply a contract, which, as effectually as the most express

ROSE
v.
EARL OF FIFE.

might have charged for doing the third part of the business. If, therefore, the supposed discharge be not clear and direct, we ought to consider the justice of the case before making it out from circumstances. The allowance given in a similar case to Mr. M'Murdo, is proof of what the Court would do here, if not barred by the alleged discharge. As to the words management of affairs, they allude to the new commission given him in January 1791, and not to those extensive extra matters in which he became to be employed chiefly *after that period*. This could not then be in view, far less to discharge them. The £100 per annum, with a house and farm, was scrimp even for factor and chamberlain business; and the continuation of this sum during life was to make up for that deficiency in some degree, and also by way of inducement to his heirs to continue him. The £500 granted in 1773, which seems to have come in the place of the former deeds, or intended deeds of legacy, real or pretended, must have been understood by himself as the smallest consideration he could propose for the services performed *before that period*, and still could not be meant in full of after services, which did not then exist. I therefore think he is foreclosed as to salary *qua* factor, but not *quoad ultra*."

LORD JUSTICE CLERK.—"I am for adhering."

LORD CRAIG.—"I am of the same opinion. The matter of remuneration was finally fixed by agreement."

LORD HERMAND.—"I rather incline to think that there was no agreement except as to the factory. My difficulty is in regard to the discharges."

LORD MEADOWBANK.—"I am sorry to be of opinion with the interlocutor; but a claim for labour, after discharges *de anno in annum* cannot be listened to."

LORD BALMUTO.—"I am for altering."

LORD WOODHOTSLEE.—"I think there was here, on the part of the Earl, a studied plan to deceive the pursuer by these bequests, and therefore I am for altering."

LORD BANNATTYNE.—"He ought to have made his charge at the end of every year."

President Campbell's Session Papers, vol. 108.

1806.

 ROSE
 v.
 EARL OF FIFE.

and formal deed, binds the professional man on the one hand, having undertaken the charge, to that degree of diligence which belongs to the contract, and, on the other, as distinctly imposes an obligation on the employer to pay the regular hire for what is done; but the appellant has been proved to have performed a vast variety of professional acts wholly unconnected with his duty as a factor, and these, while they were most valuable to Lord Fife, proved a very extensive sacrifice of time and talents on the part of the appellant, who had been led to expect the full power of applying his professional skill in the lucrative service of other clients. Of this proposition the judges of the Court of Session were well satisfied. Many of them had an opportunity of knowing the extent of the appellant's employment, when at that bar they acted as counsel for Lord Fife; and they were unanimously impressed with the conviction of the extent, variety, and value of the appellant's services beyond the limits of his duty as factor. 2. But this obligation incumbent on Lord Fife, rests not entirely on the implication of a contract, with the circumstances of employment and unexceptionable performance. Other circumstances strongly confirm this obligation or contract upon Lord Fife. These circumstances were, that the Edinburgh agents and the country writers were employed at a great expense, with salaries, &c. in the Earl's business, at the time of his succession. That it was his declared resolution to change that system, and devolve the same business on one who should labour, and earn by it his "penny fee," and that the appellant was selected and chosen for that purpose. 3. The conclusion which follows from these circumstances, is a demand for recompense in favour of the appellant, and this appears so reasonable, that nothing could resist it but the objection which is stated, namely, that the factory named a sum for his remuneration, and the bond of annuity for £100 during his life, was a sufficient recompense for all. But it is quite apparent that the factory did not refer to the new duties subsequently imposed. Nor could the bond of annuity infer an obligation to do other acts than those belonging to the factor.

Pleaded for the Respondent.—The salary or annuity, for which the appellant had credit in the accounts which were annually settled between the parties, for a period of thirty successive years, was allowed to and received by him, in full of all demands he could have for trouble in the respondent's affairs. Every circumstance demonstrates this. The mutual

discharges regularly annexed to the accounts are in the most general, comprehensive terms, without qualification or reservation, in any instance, to countenance the present demand as for extra services. It is in vain to allege, that the allowance so stated was only in respect of trouble had in the department of steward or factor; for these accounts relate to every transaction in the respondent's affairs, where money came into the appellant's hands, or was expended by him; and it is difficult to conceive any piece of business unattended by some expense, particularly a variety of articles in these accounts, as for the appellant's travelling charges and the like, regarding the very matters for his personal trouble and assistance in which he now asks recompense. The payments made by him to other persons, who were joined with him in the business and transactions alluded to, including what they received as for agency, are stated, and yet it is not alleged that, in all that long course of time, he made a charge for his own trouble, independent of, or besides his salary, or hinted that such a demand was reserved. Why did he refrain for thirty years from making this demand for extra trouble? Simply because he knew that the claim was quite untenable and groundless.

1806.

JOHNSTONE,
&c.
v.
STOTTS.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Wm. Adam, John Clerk, George Jos. Bell.*

For Respondent, *T. Erskine, Henry Erskine, J. P. Grant.*

NOTE.—Unreported in the Court of Session.

PETER JOHNSTONE of Carnsalloch, Esq., and	} <i>Appellants;</i>
Others, Murray of Broughton's Trustees,	
WATSON STOTT and EBENEZER STOTT of	} <i>Respondents.</i>
Kelton, and their Attorneys,	

House of Lords, 2d May 1806.

CRUIVE FISHING — ILLEGAL ENGINES — IMPORT OF REMIT FROM HOUSE OF LORDS.—Circumstances in which the Court were held entitled, under the remit of the House of Lords, to regulate the construction of the cruives, dikes, and boxes, and the construction and position of the inscales, as well as the spars and hecks used in

1806. such fishing. Affirmed in the House of Lords, with the exception as to the cruive boxes, which was remitted for reconsideration.

JOHNSTONE,
&c.
v.
STOTTS.

This is the sequel of the case, reported ante Vol. iv. p. 274, which had reference to the appellant using certain illegal engines in the exercise of his right of cruive fishing on the river Dee, and concluding to have him to regulate the fishing *conformably* to the rules of law established in all cruive fishings.

Feb. 18, 1802. The interlocutor of the Court of Session was appealed to the House of Lords, whereupon their Lordships pronounced this judgment:—"Ordered and adjudged that the said interlocutor of 13th Dec. 1799, complained of in the said appeal, be varied, by leaving out after the words 'are to be,' the words (so formed, constructed, and fixed, as to answer the purpose of a cruive fishing, and agreeable to the practice of those fishings in the north of Scotland, where the cruives have been):" And it was further ordered, "That the cause be remitted back to the Court of Session in Scotland, to review this part of the said interlocutor, for the purpose of giving, and to give precise directions to the parties, for regulating the form and construction of the cruive dikes and boxes, and the construction and position of the inscales, according to law."

When the case came back to the Court of Session on the above remit, the parties differed as to the import of it, and the Court's powers under it.

The appellant contended, that when the words directed to be left out by the judgment are left out, the decree would run thus:—"That the construction of the cruive dikes and boxes, and position of the inscales, are to be *regulated according to law*;" and the remit to the Court being to give "precise directions to the parties for regulating the form and construction of the cruive dikes and boxes; and the construction and position of the inscales *according to law*," the only power left to the Court was, what regulations on those matters had been established by law, or by general usage, and immemorial practice, as constituting the law; and, if there were any, to order them to be observed; but he maintained the Court had no power, under the remit, to make new and arbitrary regulations, as was craved by the respondents. The respondents, on their part, craved the Court to resume the consideration of the cause, and to give precise directions for regulating the form and construction of the cruive dike and boxes, and the con-

struction and position of the inscales, and insisting, in particular, that an open or sparred top to the cruive boxes was inconsistent with the fair exercise of cruive fishing, and contrary to the intendment and spirit of the statutes.

1806.

JOHNSTONE,
&c.
v.
STOTTS.
June 25, 1802.

This interlocutor was pronounced :—" Having considered
 " this petition, and remit thereon from the Court, judgment
 " of the House of Lords, minute for the petitioners, and an-
 " swers for the trustees of James Murray, Esq., to the peti-
 " tion and minute, Finds, decerns, and declares, in terms of
 " the said judgment of the House of Lords. And further,
 " finds, that the cruive dyke shall be of the same height as
 " it has formerly been, built of rough stones, in a compact
 " and substantial manner, without loose or projecting stones :
 " Finds, that the spars of the hecks shall be perpendicular,
 " and shall not exceed the same dimensions as at present,
 " being five inches of depth in the direction of the stream,
 " and two inches and a half cross the stream ; that the
 " lower edge shall be one inch thicker than the upper, and
 " that they shall be rounded to a semicircle both at the
 " upper edge and the lower : Finds, That the inscale or
 " combs shall be so constructed as to answer the purposes of
 " a cruive fishing, as formerly, and shall not be altered to the
 " prejudice of the petitioners : Finds, That the new cruives
 " shall be of the same length, breadth, and depth as former-
 " ly, according to the plan in process, and shall be placed
 " in the dyke in the same manner as formerly, and decerns.
 " Appoints the parties to give in minutes, as to the pro-
 " posed regulation, whether there shall be no openings or
 " spars laid across on the top of the cruive box as formerly ;
 " or that the same should be closely covered over with
 " wood : And also, as to the regulation that there shall be no
 " fishing from the 26th of August to the 11th of December,
 " in every year, and that during that time the cruives must
 " be entirely removed, and the channel of the river kept
 " clear and open, without any stones or other materials
 " being allowed to remain in the opening of the said cruives,
 " and to put printed copies of the said minutes into the Lords'
 " boxes, in order to report the same to the Court." When
 the minutes were given in, the Lords found,— " That the July 6, 1802.
 " cruive boxes must be closely covered with wood at the
 " top, and that the hecks and inscales must be removed
 " in forbidden times ; and find it unnecessary to deter-
 " mine upon the demand of the pursuers, for observance of
 " the act of Parliament, respecting close time, and decern."
 On reclaiming petition, the Lords adhered. Nov. 23, 1802.

1806.

JOHNSTONE,
 &c.
 v.
 STOTTS.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The decree, in the former stage of the case, as varied by the judgment of your Lordships, is, That the construction of the cruive dyke and boxes must be *regulated according to law*; and the cause was remitted to the Court of Session for the purpose of giving precise directions for regulating the form and construction of the cruive dyke and boxes *according to law*. The proper subject for the consideration of the Court, when the cause came back, therefore, was, What the law on the subject was? It is admitted by the respondents, that the form and construction of cruive dykes and boxes are not regulated by any statute, and no decision has been pointed out which can be considered as establishing the law on the point. While the appellant, on his part, confesses, that if any general uniform usage, respecting the form and construction of cruive dykes and boxes has prevailed for a long tract of time, it must be held as law, but they have not been able to learn that there has been any usage on the subject; and, therefore, maintains that the dyke, as ordered to be erected of rough stones, in a compact and substantial manner, without loose and projecting stones, necessarily implies that a dyke is to be formed of stones cemented with lime and mortar, which in no case has ever been heard of in such fishings. Again, in regard to the boxes, to have them close at the top, was to render his fishings useless in such places as the fishing in question. Besides, it has been the practice, from time immemorial, in the fishings in these parts, to have the boxes open at the top. But the Court, in a matter which could only be ascertained by inquiry and proof, have laid down regulations of their own, entirely injurious to the appellant's fishing.

Pleaded for the Respondents.—The Court, in ordering the dyke to be erected in the manner they did, and the cruive boxes to be open at the top, have complied with the remit from the House of Lords. All that is found is, that the dyke should be of the same height as formerly, built in a compact and substantial manner; that the inscales shall be constructed as formerly, and that the new cruive boxes shall be of the same dimensions as formerly. This is doing nothing more than enforcing the former usage, which the appellants, in other particulars, insist for themselves. The perpendicular position of the spars is essential to the fair exercise of cruive fishing, and is universally observed in all

cases, as well as the regulation of the covered top of the boxes.

After hearing counsel,

LORD CHANCELLOR ERSKINE said,

" My Lords,

" This action was originally brought before the Courts of Scotland against Mr. Murray of Broughton, the proprietor of Tongland, on the ground of exercising his right of fishing with unlawful engines, and in an illegal manner. (The conclusions of the summons read). The Court then pronounced the interlocutors. (Read.)

" When first presented to this House by appeal, it appeared to a noble and learned Lord, who paid attention to the cause, that there was a defect in the interlocutor, because, instead of rules of law being the *ratio decidendi*, it had reference to the practice in the north of Scotland in regard to cruive fishing, and therefore that was corrected by this House. (Reads the judgment).

" From that time, it was necessary for the Court to see that the fishing was regulated agreeably to law, and not to practice.

" After the cause was remitted, the Court of Session pronounced another interlocutor. (Read.)

" And upon appeal of that interlocutor, this difficulty was occasioned, Whether, by the alteration of the former interlocutor, the Court was to see the fishing regulated according to law, as we do not see from the words how regulations made could be a regulation according to law.

" From the many statutes passed in Scotland, the great object was, notwithstanding the rights of individuals—the preservation of the fish,—and the cruives were to be regulated by certain specified rules, so as to prevent the breed of fish from being destroyed. Therefore, these statutes promoted this object, and laid down the mode of regulating the cruive fishing and cruives. It appeared, in looking at these statutes, that none of them comprehended cruive boxes covered at the top. Neither does there appear any judgment of Court as to this. No doubt, they have power of judging what was meant by the statutes, on a sound construction of them, and to consider whether all cruives, so covered, are legal or not.

" It is said, that the Court of Session, in consequence, exercise a very extended jurisdiction. But when Courts are to pronounce judgments that regulate matters according to law, this must be either by statute, or by rules established by practice.

" Nor am I clear that this is to be altered. It may appear to the Court that all such fishings ought to be regulated as a general rule of law; or it may appear, that in this particular river a different practice was necessary, by the nature of the river itself, so that these

1806.

JOHNSTONE,
&c.
v.
STOTTS.

1806. cruive boxes ought to be constructed as the Court has here ordered.

JOHNSTONE, &c. v. STOTTS. " But the difficulty here is, that the Court has not gone into any evidence to show that the particular fishing here was different from other fishings in Scotland; and, therefore, I affirm that this would amount to a declaration, that the direction of the House of Lords had said, that *all* cruive boxes *so* constructed, are to be closely covered at the top. This may be attended with consequences which we can form no opinion of.

" It may be, when the case is remitted, that the Court may say, that all cruive boxes should be so constructed, and it afterwards turn out, that if this is pronounced as a general rule of law, other parties ought to be heard on that point. They did not give, on the former occasion, this specific direction.

" But if the Court, on remit, say, that it need not be generally so held, but here in this river, unless the cruive boxes are so covered, they must be a nuisance to the superior heritors.

" The Court, entering into that by evidence, not general but particular, may come to some conclusion, and then it may stand on law and evidence.

" In all other respects, except closely covered boxes at the top, I think the judgment correct.

" Your Lordships meant them to review the whole matter, to hear parties, and to state in their judgment what they find.

" If founded on any general rule of law, then they might refuse to hear evidence; but, if meant not to found on any such general rule, then this will give room for parties to hear evidence."

It was therefore

Ordered and adjudged that the cause be remitted to the Court of Session, to review the interlocutors complained of, as far as respects the direction that the cruive boxes be closely covered with wood at the top, and to hear the parties, and their evidence thereon, and to state in their judgment, whether they find, that the cruive boxes should be so covered as a general rule of law, applicable to all cruive fishings, or whether only as it respects the cruive fishing in question. And it is further ordered and adjudged that the said interlocutor, in all other respects, be affirmed.

For Appellants, *S. Percival, Wm. Alexander.*

For Respondents, *Wm. Adam, John Burnett, J. P. Grant.*

NOTE.—Unreported in the Court of Session.

1806.

[Fac. Coll. Vol. xiii. p. 292.]

MARTIN, &c.
v.
MACNABB, &c.

JOHN MARTIN and Others, of the Borough } *Appellants*;
of Queensferry,
ALEX. MACNABB and Others, of the said } *Respondents*.
Borough,

House of Lords, 1st July 1806.

ELECTION OF FREEMEN OR BURGESSES.—Circumstances in which it was held that such election must take place at a meeting of the council legally called, and held for that purpose.

In the burgh of Queensferry there were three bailies, each of whom, according to the custom of the burgh, at one time, had the power to give the freedom of the burgh to any person he thought proper. But, by act of council in 1802, the town council thought it proper to restrain the magistrates in this power so exercised, and passed an act of council in these words:—"The council resolve and enact, that in future no person shall be admitted to the freedom of this burgh, without the consent of a majority of the town council first had and obtained thereto."

From a difference in opinion as to the interpretation of this act, a practice grew up of granting the freedom of the burgh to any person, without any meeting of the council being called for that purpose, upon obtaining the consent of a majority of the town council, until the election of the appellants as magistrates and town council took place, in September, whereupon the respondents brought a petition and complaint to the Court, complaining that the appellants were unduly elected. That by virtue of the above act of council, no person could obtain the freedom of the burgh but by a public act of the town council, regularly assembled in its corporate capacity; and the appellants not having been elected burgesses in this manner, were ineligible to be elected magistrates and town council.

The Court of Session pronounced a special and articulate interlocutor; and the part of it which raises the present question is in these words; 3tio, "Find that burgesses Feb. 2, 1803. are only admissible by a majority of the council present at a legal meeting." On two reclaiming petitions the Feb. 22, — court adhered. June 24, —

1806.

Against these interlocutors the present appeal was brought.

MARTIN, &c.
v.

Pleaded for the Appellants.—Before the bye-law or act of council in 1802, it is not disputed that the immemorial custom and usage of the burgh was to give each of the burgesses a power of conferring the freedom of the burgh without consulting any one, or the consent of the council regularly convened at a meeting. Therefore, if the present objection had been made before the passing of the act of council in 1802, it could not for a moment have been listened to, because a legal practice of so appointing had been in this, as in many other burghs, thoroughly established. The question then comes to be, Does this act of council make imperative for all who are admitted to the freedom of the burgh, to be elected thereto by a majority of the council at a meeting regularly convened in a corporate capacity? It was maintained, upon the construction of the bye-law and act of 1802, that the old practice or custom of the burgh was unchanged; and all that it provided or required was that the burgesses be admitted with the consent of the majority of the town council, however obtained. That this was the meaning of the act, in the understanding of all who passed it, is proved, by their adopting a practice conformable thereto. The majority of the council consenting, was the leading feature and chief object wished to be attained by the bye-law; and, therefore, to hold that a regular meeting of the town council was also necessary for that purpose, is to depart altogether both from the spirit and express meaning of the bye-law itself.

Pleaded for the Respondents.—There is no evidence to show that the five pretended councillors were ever admitted to the freedom of the burgh, as burgesses, in a regular manner. And where, as in this case, the act of council makes it necessary that such burgesses be admitted by a majority of the town council, this implies that the power lies with them as a corporation, and that the exercise of a corporate act cannot be legally performed except at a meeting of the town council regularly convened for that purpose. A meeting of the town council, regularly assembled and constituted, was necessary, in order legally to admit the appellants as burgesses; and this not having been attended to, they are not eligible to be appointed members of the town council.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed. 1806.

For Appellants, *Henry Erskine, John Clerk, Wm. Adam.*
For Respondents, *Wm. Alexander, David Boyle.*

RAES
v.
NEWAL.

JAMES RAE, Merchant in Dumfries, WILLIAM }
RAE, Merchant in Kingston, Jamaica, and } *Appellants ;*
JOHN RAE, Farmer at Torrorie, - }
MARGARET NEWAL, formerly RAE, Wife of }
David Newal, Writer in Dumfries, and the } *Respondents.*
said David Newal for his interest, - }

House of Lords, 2d July 1806.

EXECUTRY—RETENTION—DEBT—DISCHARGE.—A daughter raised an action against her brother intromitting with her deceased father's personal estate, for her third share of the executry due her as at his death. The brother refused payment, and claimed to retain her share, for large advances and othersums made to her husband during the father's life. Circumstances in which it was held, that her deceased father having entered into a transaction and agreement, by which he had discharged all these claims for advances, she was entitled to her third share of the executry.

Fergus Rae, whose estate is now in dispute, died intestate in September 1797, leaving issue the appellants, his three sons, and a daughter, the respondent, Mrs. Newal. Their father left heritable property to the amount of £3000 or £4000, and personal estate worth £4693. 11s. 4d. 1797.

James, the eldest son, succeeded to the heritable estate, and, by the law of Scotland, the personal estate behoved to be divided equally among William, John, and the respondent Margaret Raes.

Although James Rae had no interest in the personal estate, yet he improperly possessed himself of that estate, and took upon himself the administration of it for the benefit of his two brothers, they residing at a distance, and conceiving, besides, the idea that the respondent had no right to any part of it.

In these circumstances, the present action was raised by the respondents, setting forth "That as no settlement had been executed by the said Fergus Rae, the said James

1806.

RAES
v.
NEWAL.

"Rae, his eldest son, succeeded to the heritable estate, "which is very valuable, and the saids John Rae and Wm. "Rae, and the pursuer Margaret Rae, as the executors and "nearest in kin to their father, acquired right equally "amongst them to the moveable estate, means and effects, "left by the said Fergus Rae, their father, to a great "amount: That the said James Rae, the eldest son, immediately after his father's death, without the consent of the "said brothers and sister, or any legal right or title whatever, thought fit to take upon him the sole management "of his father's affairs, intromitted with, uplifted, and disposed of the whole household furniture, debts, and sums "of money, and other means and effects which he died "possessed of, and refuses to render any account thereof, "or to make payment to the pursuer, Margaret Rae and "her husband, of their third share of the said moveable estate, to which they have an undoubted right by "law." And, therefore, concluding to produce and exhibit an exact inventory of the personal estate, and to hold just count and reckoning with the respondents, and make payment to them of their just equal third share of the said personal estate. The appellant also brought a multiple-pounding.

In defence to the main action, the appellant James admitted, that, after payment of all debts, there was a free balance of funds in his hands of £4693. 11s. 4d., of which the respondent's third amounted to £1564. 10s. 3½d. But he pleaded that he was entitled to retain that sum until the respondents severally fulfilled certain obligations that became vested in him, as the heir of Fergus Rae. Separately, That the respondents were, as in an accounting with the other younger children, bound to deduct or set off the value of an heritable subject that had been purchased by Fergus Rae, and transferred by donation of him to the respondents.

But the circumstances which the respondent stated to meet this defence were:—that the late Fergus Rae had, on the outsetting of all his children, given them large advances to begin with, with the exception of his daughter, the respondent, to whom, on her marriage, he gave nothing; and in order to put her on an equal footing with the rest of his children, he made a donation to Mrs. Newal of a small piece of ground or field, which he purchased for that purpose, taking the rights from the seller "to and in favour of

1790.

"the said David Newal, and Margaret Rae his spouse, and
 "the longest liver of them two, in conjunct fee and liferent,
 "and to the children procreated, or that may be procreated
 "between them, in fee, absolutely and irredeemably, All
 "and whole that park or enclosure," &c. There was super-
 added a clause, providing, that notwithstanding the chil-
 dren of the said David Newal and Margaret Rao are vested
 in the fee of the foresaid subjects, "yet it shall be in the
 "power of the said David Newal and Margaret Rae, or
 "survivor of them, to sell or otherwise dispose of the
 "same, as they shall see most advantageous for their chil-
 "dren's behoof, and to divide the price among them in such
 "shares and proportions as they may think proper."

1806.

 RAE
 v.
 NEWAL.

Having also taken one of the farms on lease belonging to
 the Duke of Queensberry, on the grassum principle, the de-
 ceased Fergus Rae became bound as security in a bill for
 the amount, £420, as well as a cautioner in relief to his own
 cautioners, as Collector of Supply for the county of
 Dumfries.

In July 1796 the respondent, David Newal, became bank-
 rupt, while the negotiation as to the lease was not completed,
 although the factor had received the bill, and had, in return,
 become bound to procure the lease. In these circumstances,
 the Duke directed his factor to declare the proposed lease
 at an end, and to advertise the farm.

At a meeting of his creditors, James Rae made offer of
 5s. in the pound for the respondent, which was accepted of,
 Fergus Rae the father being present, and consenting as a
 creditor. It appeared that the appellant James Rae was acting
 for Fergus Rae in this offer, and by whom all the debts due by
 the respondent were afterwards paid. In return for this, Fergus
 Rae, with the consent of James, got an absolute disposition to
 the lands possessed by the respondent Newal, called Bushy-
 bank, and other houses, together with certain debts and per-
 sonal funds due to him. But no conveyance was sought or grant-
 ed, of the above enclosure, although the appellant contend-
 ed that it was comprehended under the above conveyance,
 and, therefore, until given up, the share of the executors
 ought to be retained.

After having thus settled with his creditors, he renewed
 his negotiations for the farm, which had been broken off,
 and the bill returned by the Duke. He succeeded in ob-
 taining this without any security.

In these circumstances, the respondents pleaded, that

1806.

RAES

v.

NEWAL.

Jan. 14, 1800.

whatever debt he owed to Fergus Rae at the time of his bankruptcy must be held to have been discharged, by his acceding to the offer of composition, and by the agreement and conveyances then made and gone into, whereby he had conveyed to him all his heritable and moveable property.

The Lord Ordinary pronounced this interlocutor:—"Find that the late Mr. Fergus Rae must be held and considered as having acceded to the measures adopted by the creditors of the pursuer David Newal, and bound to discharge his own debts amongst with them, for the composition of 5s. per pound; and, in respect of the whole circumstances of the case, in particular, of Mr. Rae being entitled to receive a conveyance of the whole estate, heritable and moveable, of Mr. Newal, as narrated in the disposition, of date the 5th day of October 1796; therefore, upon these grounds, repels the general defence pleaded by the defender, James Rae, in the action of constitution against him; and, in the process of multiplepinding, finds the pursuers, Mr. and Mrs. Newal, entitled to one-third or share of the executry funds left by the said deceased Fergus Rae; but, in respect it is said that the whole heritable and moveable property of Mr. Newal has not been disposed in terms of the obligation come under when the agreement to pay and accept of the composition of 5s. per pound was entered into; and that part of the subject has been and still is retained by Mr. Newal, finds, that the pursuers are not entitled to hold possession of any part of the property so conveyed, but must divest themselves, and make over the same, if there be any such, before drawing any part of the third of the executry of the late Mr. Rae; and, in order that the facts with regard to this point may be ascertained, appoints the cause to be enrolled, and parties procurators to be heard at the bar—against the first calling." To this interlocutor the Lord

Jan. 28, Feb.
14, March 8,
and May 23,
1800.

Nov. 19, —

Ordinary adhered on advising several representations.

On the other points the Lord Ordinary found: "That the circumstance of Fergus Rae having bought up the debts of Mr. Newal at the rate of 5s. per pound, on condition of obtaining an assignation to his funds, does not bar the pursuers from insisting in this action for a third share of the executry after his decease: Finds, that the subject in Dunfries, and the lease of the farm of Tibber, were not included to Newal's obligation to assign his funds to Fergus Rae; and therefore refuses the desire of the representation, and adheres to the former interlocutor."

"tor." To this interlocutor the Lord Ordinary, on advising representations, adhered. 1806.

On further representation the Lord Ordinary pronounced this interlocutor : find " That the respondents, before drawing any part of their third share of the executry, are bound to assign and make over to the representer (appellant), their right and interest to the subject in Dumfries; and, with this alteration, adheres to the interlocutor complained of, *quoad ultra*, and refuses the desire of the representation." Other six representations for the appellant James were refused, 28th May, 16th and 24th June, and 10th July 1801, 19th Jan. and 3d Feb. 1802.

RAES
v.
NEWAL.
Dec. 4. and
20, 1800.

The appellant James Rae, and also the respondents, put in reclaiming petitions to the Court. The Lords refused the petition for the appellant, and pronounced this interlocutor as to the respondents :—" Having advised this petition, with the answers, alter the Lord Ordinary's interlocutor reclaimed from; find that the subjects in Dumfries were not included in Mr. Newal's obligation to assign his funds; and remit to the Lord Ordinary to proceed in the cause accordingly." On further petition they adhered; and found the pursuers (respondents) entitled to an interim payment of £1200 Sterling from the petitioner, and decern for payment thereof, and for £10 Sterling as the expense of the answers, together with the full expense of extract. June 30, 1802. Feb. 8, 1803.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The respondent, Mr. Newal, being largely indebted to the estate of Fergus Rae, after imputing all that was recovered under the conveyances executed by him in Mr. Reid's favour, cannot be allowed to take the third share of the free produce of that estate, as coming to him in the right of his wife, without paying what he is so indebted, or, in other words, the one sum must be set against the other, and an account instituted between the parties on that footing. The respondent, David Newal, does not dispute that this ought to be the course, and must be the consequence, if he is indebted to the estate of Mr. Fergus Rae; but he denies the debt, alleging, in the first place, that Mr. Rae agreed to take 5s. in the pound as a composition, and thereupon to discharge him, and that the sums recovered by Mr. Rae were sufficient to pay that composition, as well as what he advanced, or is alleged to have advanced, to the other personal and unpreferable creditors of the

1806.

RAES
v.
NEWAL.

respondent Newal, and to this the Court has given its sanction, by finding "that the late Mr. Fergus Rae must be held and considered as having acceded to the measures adopted by the creditors of the pursuer, David Newal, and bound to discharge his own debts alongst with them, for the composition of 5s. in the pound." The only evidence from whence this can be inferred, is the minute of what passed at the meeting of Mr. Newal's creditors held on the 28th July 1796. But the appellants submit that this conclusion is not authorized by the words of the minute, and that the whole circumstances demonstrate that it was not in contemplation, nor could it be the intention of any of the parties to that transaction, that the demands Fergus Rae had or might have upon the respondent Newal, were to be restricted to a fourth part, or that Newal was to be discharged from these demands, when Mr. Rae had got 5s. in the pound. The appellant acknowledges, though the proposal to the creditors was made by him, yet, in so doing, he was acting for his father, Fergus Rae, from whom, accordingly, the money came, which the compounding creditors received, and to whom, accordingly, the conveyances of the bankrupt's estate were made. Fergus Rae may therefore be viewed as having been the actual proposer of this composition contract, by which it appears he proposed "to pay to the personal creditors a composition of 5s. in the pound of their respective debts, provided that he was put into the immediate possession of Newal's funds, so as he might be enabled to convert the same into money, and that the creditors, when paid, should accept of the said composition, in full of their respective debts, and grant to him such conveyances, or discharges thereof, as should be thought proper." Here, it will be seen, that there is nothing said about discharging Newal. On the contrary, Mr. Rae stipulates, that on payment of the composition, the creditors should either convey their debts to him, or discharge them, as he thought proper. The other creditors were to take their composition *as in full*, but not from Mr. Newal, it was from Mr. Rae, who was to be put in their place, the reason of which obviously was, that he might keep up the debts, if necessary, against Newal and his estate. But, 2nd, it is therefore quite untenable to suppose this transaction to have been an agreement between Mr. Newal and Fergus Rae, whereby the latter undertook to discharge all his debts, in the above form, upon the former receiving the conveyance to the

whole property, real and personal, belonging to the bankrupt. Mr. Rae did not expressly agree to take the same composition as the other creditors, yet this is the inference which the respondent draws and maintains from his conduct. He did not, by any deed or act, expressly discharge Newal, and surely a discharge of a legal demand is not to be presumed from facts and circumstances, or from the conveyance made by Newal to Fergus Rae. No doubt, the conveyance to the enclosure or piece of ground has never been made, and, therefore, to that extent, he is entitled to set off its value against the claim now made.

1806.

RAE
v.
NEWAL.

Pleaded for the Respondents.—The respondents' title to the third part of the executry claimed by them of Fergus Rae's moveable or personal succession, is unquestionable; and the sum awarded by the interim decree of the Court of Session is below its amount. The objections and counterclaims insisted on by the appellant James, are not founded on law, and some of them cannot be set up by him. The agreement between Mr. Fergus Rae and Mr. Newal is fully established by the whole writings and conduct of the parties to have been thus:—That Mr. Rae should obtain, by a conveyance from Mr. Newal, an absolute and irredeemable right to the proper estate of Mr. Newal that belonged to him on 28th July 1796, and, on the other part, Mr. Rae should, as creditor, grant to Mr. Newal, and by a transaction with the other creditors, procure to him a discharge of all the debts he owed at that date, thereby securing to Mr. Newal the enjoyment of whatever property he should acquire subsequently thereto. That such was the nature of the agreement seems to be admitted, and cannot well be controverted. Had Fergus Rae not bound himself as a creditor by that transaction, as well as the other creditors, it would have been unfair in the extreme, and contrary to the *bona fides* of that transaction; for it would be giving him an advantage over the other creditors, which was never intended by that transaction. 2. The conveyance of the enclosure, or small piece of ground, it is well known, the respondents only enjoy a liferent of it, the fee being in their children; besides, by the sound construction of the obligation, the obligation and conveyance extend only to the proper estate of Mr. Newal, and does not extend to the liferent. But, in point of fact, the estate actually conveyed and taken possession of by Fergus Rae, was more than sufficient to indemnify Mr. Rae of all the engagements come under, and of all the advances made

1806. on the respondent, Newal's account, so that the claim now made for an assignment to this liferent estate, and also to his interest in the lease in Tibbers, is wholly untenable, and ought therefore to be rejected and disallowed.

GRAHAM
V.
COUNTESS OF
GLENCAIRN,
&c.

After hearing counsel, it was Ordered and adjudged that the appeal be dismissed, and that the interlocutors be, and the same are hereby affirmed.

For Appellants, *John Clerk, William Alexander, Geo. Jos. Bell.*

For Respondents, *Wm. Adam, Robert Corbet.*

NOTE.—Unreported in the Court of Session.

[Mor. App. i. Heir Apparent, No. 1.]

WM. CUNNINGHAME GRAHAM, of Gartmore } *Appellant;*
and Finlaystone, - - - - - }

ISABELLA, COUNTESS DOWAGER OF GLEN- } *Respondents.*
CAIRN, and WILLIAM INGLIS, W.S., her }
Attorney, - - - - - }

House of Lords, 7th July 1806.

ENTAIL—LIFERENT LOCALITY—HEIR APPARENT—ONEROUS DEBTS
—ACT 1695, c. 24.—An entail reserved power to the heirs of entail to grant liferent infeftments to their wives, the said provisions not to exceed a fourth part of the rental of the estate, so far as the same was free of former liferents. A liferent locality was granted by Earl John, in favour of his wife. He died without issue, and without having made up his title to the entailed estates. The next heir passed by him as apparent heir, and served heir to his immediate predecessor. In an action raised by the widow of Earl John, under the act 1695, c. 24, to compel him to grant a disposition of the locality lands, it was answered, that the statute did not comprehend such debts as apply to apparent heirs of tailzie or to tailzied estate, but only to fee simple estate, and to such debts as were onerous. Held the Countess entitled to her life-rent locality. Affirmed in the House of Lords.

1708. William, Earl of Glencairn, executed a strict entail of the lands and barony of Finlaystone, containing the usual prohibitory, irritant, and resolute clauses. The entail reserved power to the heirs of entail "to grant liferent infeftment to their ladies or husbands, in satisfaction to them of a

"terces or courtesies, from which the ladies and husbands
 "of the said heirs and members of tailzie are hereby alto-
 "gether excluded and debarred;" "the said provisions not
 "exceeding a fourth part of the rent of the said lands,
 "lordship, and baronies, and others; and that only in so
 "far as the same is free and unaffected for a time, with for-
 "mer liferents or real debts."

1806.

GRAHAM
 v.
 COUNTESS OF
 GLENCAIRN,
 &c.

William, the second Earl of Glencairn, on his father's death, was served heir of entail; and having been feudally vested with the estate by charter and infestment, he executed a liferent locality and disposition in favour of his countess, equal to a fourth part of his estate. On his death, he was survived by the countess, and his son James succeeded to the title and estate, in which he was regularly infest under the entail, but died unmarried in 1791, whereupon his brother John, the last Earl of Glencairn, succeeded, but died without issue in 1796, and without having made up a feudal title under the entail. Before his death, he had executed a disposition and liferent locality in favour of his countess, Isabella Erskine, Countess of Glencairn. At this time the Dowager Countess of Glencairn, spouse of the second Earl, was still alive, enjoying her liferent locality; but the disposition of this second liferent locality was granted merely to the extent of the fourth of the free rents of the said estate, after deducting the liferent locality payable to the Countess Dowager.

1775.

1791.

1796.

On the Earl John's death, the entailed estate of Finlaystone descended to the appellant's father, Mr. Graham of Gartmore, who completed his feudal title under the entail, by passing over Earl John, the apparent heir, and serving to his brother, Earl James, who was feudally infest.

Mr. Graham died in 1798, and was succeeded by his son, who served heir in general to his father.

The present action was brought by the respondent against the appellant, in whose favour her husband, Earl John, had granted the liferent locality, second above mentioned, to compel him to convey to her in liferent the lands settled upon her by the disposition above mentioned, setting forth and narrating the act 1695, c. 24, by which "Our sovereign
 "Lord, considering the frequent frauds and disappointments
 "that creditors do suffer upon the decease of their debtors,
 "and through the contrivance of apparent heirs in their
 "prejudice, for remeid thereof, and also for facilitating the

1806.

GRAHAM
v.
COUNTS OF
GLENCAIRN,
&c.

“ transmission of heritage in favour of both heirs and creditors, [his Majesty, with the advice and consent of the estates of Parliament, statutes and ordains, that if any man, since the first July 1661, has served, or shall hereafter serve, himself heir ; or by adjudication on his bond, hath, since the time foresaid, succeeded, or shall hereafter succeed, not to his immediate predecessor, but to one remoter, as passing by his father to his godsire, or the like, then and in that case, he shall be liable for the debts and deeds of the person interjected, to whom he was apparent heir, and who was in the possession of the lands and estate to which he has served, for the space of three years, and that in so far as may extend to the value of the said lands and estate.”

In informations which were ordered, it was admitted by the respondent (pursuer) “ that the disposition of locality could not be directed against the estate of Finlaystone, in regard that her husband, the late Earl, had died in a state of apparenecy ;” but she maintained, that the appellant could be obliged, in terms of the above act 1695, c. 24, to make good this provision to her, and to grant a new disposition of locality in terms of the one granted by her husband, Earl John, with a precept of sasine, upon which she might be infeft.

In defence, it was stated by the appellant, That an estate cannot be affected by the debts or deeds of any person whatever, unless he be a proprietor, feudally vested with the estate. That the statute 1695 did not infringe on this rule, and, moreover, did not apply to apparent heirs of tailzie, or to estates held under the fetters and limitations of strict entails. That even if the statute were applicable to entailed property, as well as that possessed in fee simple, yet it was only meant to protect onerous deeds, and could not therefore support the disposition in question, which was purely gratuitous. And that though his father, the late Mr. Graham, had incurred a passive title in terms of the statute, yet it was only to *the extent of the rents of the entailed estate during his possession* ; and, therefore, in any view the obligation of the appellant cannot be broader than his father's.

May 23, 1800. The Court pronounced this interlocutor :—“ Upon reports of Lord Glenlee, and having advised the mutual informations for the parties, the Lords repel the defence.”

"remit to the Lord Ordinary to proceed accordingly."* 1806.
 The Lord Ordinary accordingly ordained the (defender) ———
 appellant to execute the disposition *quam primum*. His GRAHAM
 Lordship afterwards found, that "she is entitled, from the v.
 "period of the death of the late Countess Dowager of Glen- COUNTESS OF
 "cairn, to the liferent of the whole of these lands, and de- GLENCAIRN,
 "cern." On reclaiming petition, the Court adhered. R.C.
 Against these interlocuters the present appeal was Feb. 1801.
 brought to the House of Lords. Jan. 26, 1804.
 Feb. 21, 1804.

Pleaded for the Appellant.—The act of Parliament 1695, c. 24, is not applicable to apparent heirs of an entailed estate held under the strict fetters of an entail, but to succession to a fee simple estate. But even supposing it applicable to entailed property, it is not declared that the estate is to be burdened or affected with the debts of the interjected apparent heir. For *that* in a strict entail, and in this entail in particular, cannot possibly be. Taking the act therefore in its most liberal sense, its only effect was to render the late Mr. Graham of Gartmore personally liable for the debts and deeds of John Earl of Glencairn, and that only "in so far as may extend to the value of the said lands and estate, and no farther." But as his father, in this entailed estate, only interfered, and could only interfere,

* Opinions of the Judges.

LORD PRESIDENT CAMPBELL said,—“1st point, This case is clearly within the act 1695. In cases of bankruptcy, even voluntary post-nuptial provisions to a wife have been sustained as onerous, entitling her to rank with creditors; and, in cases of deathbed provisions to a wife, they are held onerous, and such are good, though to younger children. As to the 2nd and 3d points, I am of opinion that there is no distinction between tailzied and untailzied property, so far as the tailzie admits of the estate being burdened; and by the act 1695, succeeding heirs are personally bound to fulfill the obligation.”

LORD JUSTICE CLERK.—“1st point. I think that the act of Parliament means just to supply the want of title, and that the rational deeds of the apparent heir, three years in possession, must be held as onerous and good. 2nd point. As to the extent of liability, and also the 3d point, I think the decision, *Graham v. Creditors of Graham*, 13th May 1795, does not apply.”

Mor. p.
15439.

LORD BALMUTO.—“I am of the same opinion.”

LORD BANNATYNE.—“I am of the same opinion.”

LORD METHVEN.—“I doubt if he has done it in the way intended by the entail.”

LORD MEADOWBANK.—“I have the same doubt; it is a mere faculty.”

President Campbell's Session Papers, vol. 97.

1806.
 GRAHAM
 v.
 COUNTESS OF
 GLENCAIRN,
 &c.

with no more than the rents, it is only in so far as these were intromitted with during his possession, that the appellant can be liable to the respondent. By the act of Parliament, it is only the debts and deeds of the interjected apparent heir which can be made effectual against the succeeding heir who serves. But the disposition granted to the respondent cannot be considered in law as an onerous deed, and must be held in law as purely gratuitous, as to be revocable at pleasure by the grantor.

Pleaded for the Respondents.—This appeal, after so long an acquiescence in the interlocutor of 23d May 1800, was not expected, and the appellant is now barred in law by homologation from challenging the judgment on the original branch of the cause. He has even declared on the record, while discussing the second branch of the cause—namely, the extent of the locality, that he acquiesced in the judgment upon the first point. Nay, he has not only done this in words but also in deeds, *rebus ipsis et factis*; for he actually proceeded to execute a disposition of locality, in consequence of which she was infeft, has been in possession, and has exercised the power of turning out tenants and letting the lands on new leases. But, independently of homologation upon the part of the appellant, the interlocutors of the Court of Session are founded on law. The disposition to the Countess by Earl John was onerous, and such as fell within the provisions of the statute 1695, c. 24. That statute applies to entailed succession, as well as to fee simple estate. Nor does it follow, what the appellant contends, that if the statute applies to such estate, then it can only be to the effect of making him liable to the value of the estate intromitted with, which was merely the rents. This is a mere evasion. The obligation is to grant a disposition of a different locality, and that obligation falls on him. As to the extent of the locality, it is clear, that while the former locality existed, she could only be entitled, according to the conception of the entail, to the fourth of the free rents after deducting said locality, but now that the first locality is extinguished, she is now entitled to the full fourth of the rents of the estate.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *Wm. Alexander, Ad. Gillies, J. P. Grant*

For Respondents, *W. Adam, Samuel Romilly, Math. Ross
 H. D. Inglis*

[Fac. Coll. vol. xiii. p. 7, et Mor. p. 11962]

JAMES SMITH, Manager for the Leith Glass
Work Company, JAMES TOD, Merchant in
Borrowstounness, & Others, Underwriters, } *Appellants;*

JOHN YELTON, Merchant in Kincardine.
JAMES OGILVIE, Shipmaster there, and
ROBERT STEIN, Farmer in Loanside. } *Respondents.*
Owners of the Ship Diana of Kincardine,

1806.
SMITH, &c.
v.
YELTON, &c.

House of Lords, 21st July 1806.

INSURANCE—INSURABLE INTEREST.—A policy of insurance was effected on the salvage arising to a ship and owners, from the recapture of a vessel. She was, in a short time, captured back again by the enemy; and the questions were, 1. Whether the salvage due, on recapture of a vessel, was a valid insurable interest? and, 2. Whether the terms of the written policy, without any specification of the commencement and termination of the risk, and proper description of the subject insured, was valid? The Judge Admiral and the Court of Session, held that there was an insurable interest. In the House of Lords, the policy was held to be void and null, as not containing a sufficient description.

John Yelton, merchant in Kincardine, and part owner of the ship Diana of that port, and one of the pursuers in this action, employed Mr. Robert Allan, insurance broker in Edinburgh, to effect an insurance for £800, on the ship Diana, on a voyage from the Firth of Forth to the Baltic, which was accordingly effected. June 1797.

July 5, 1797.

A few weeks thereafter, Mr. Yelton wrote Mr. Allan, informing him that "the Diana has got safe over, and has retaken the Lady Bruce of Newcastle, said worth, with cargo, £2600; and, although I have no particular advice from Captain Ogilvie, yet as I am pretty certain that one-third will at least come to the recaptors, I judge proper to request you to cover £800 on said ship and cargo, for interest of owners of Diana; for premium of such, debit my account, advice of which you may send per bearer, who is to be in Edinburgh till four o'clock evening."

To this letter Mr. Allan returned the following answer:—

"I wrote you last post, and have since your favour of the same date, ordering me to insure £800 on the supposed salvage of the Lady Bruce of Newcastle, retaken and carried into Norway, due to the Diana. I have only been July 6, 1797.

140 . CASES ON APPEAL FROM SCOTLAND.

1806.	" able to get £400 done, at £8. 8s. per cent.	£33 12 0
	" Policy 2s. 6d.—Duty 10s.	0 12 6
SMITH, &c.		
^{v.} YELTON, &c.	" At debit of the owners of the Diana,	£34 4 6
	" I annex the underwriters' names ; and, from what I can	
	" learn, that it is as much as you can cover on the chance of	
	" salvage.	
	" £100 J. Smith.	
	" £100 J. Tod.	
	" £100 H. Smith.	
	" £50 A. Wood.	
	" £50 A. Ross.	
	" In all, £400."	

The policy was in the common form, but without any of the accustomed blanks being filled up, except, 1st. The name of the assured, viz. " John Yelton of Kincardine, for the owners of the Diana, Ogilvie." 2d. " The premium eight guineas per cent." ; and, 3d. " The date and place where the policy was executed, viz. 5th July 1797, Edinburgh." At the foot of the policy was the following memorandum : " The insurance is declared to be upon the supposed salvage due to the Diana, Captain Ogilvie, on the Lady Bruce of Newcastle, retaken and carried into Norway."

Within three days thereafter, Mr. Yelton wrote Mr. Allan, informing him that the Lady Bruce had again been captured ; and soon thereafter raised action before the Admiralty Court upon the policy.

In defence, it was stated that the pursuers had here no insurable interest. If they had, then they were bound to show the letters of marque, authorizing the Diana to make capture or reprisals on the enemy. The policy is an open policy—the subject or interest insured is " the supposed salvage due to the Diana." There is neither the name of the place from whence the ship is to proceed, nor the port to which she is bound, and for which she is to sail, nor the time at which the risk begins and the same is to end, expressed therein.

The Judge Admiral ordered the pursuers (respondents) to produce evidence of the facts, and also the policy. May 24, 1798. Thereafter he pronounced this interlocutor:—" Finds that the pursuers, by the recapture of the ship called the Lady Bruce, have qualified a legal insurable interest for the

"vage due upon the recapture of the said ship; and, before farther answer, allows the defenders (*i. e.* the now appellants) to see the object as they shall be advised to the evidence adduced of the recapture, and also of the said ship the Lady Bruce being again captured by a Dutch privateer, and allows the pursuers (*i. e.* the now respondents) to see and answer the objection when lodged." He afterwards held the defenders as confessed upon the fact of recapture by the Diana, and allowed a condescendence of the salvage that might be equitably due to her. He afterwards held them as confessed as to the value of the Lady Bruce, and decerned.

1806.

SMITH, &c.

v.
YELTON, &c.

Aug. 16, 1799.

Nov. 1, 1799.

A bill of suspension being brought to the Court of Session, the Lords, on full argument, found the letters orderly proceeded on, and decerned.*

Against these interlocutors the present appeal was brought to the House of Lords.

* Opinions of the Judges:—

LORD PRESIDENT CAMPBELL said:—"This is a question in insurance in regard to a recapture made by a private merchant vessel, without any letter of mark, and as to whether this be an insurable interest? This is a general and important question of law. The claim of salvage is founded on equity, though perhaps not in strict law. The broker, who acted for both parties, could not be ignorant of the nature of the interest nor of the premium paid. What is the practice here as to brokers being liable or not? Vide Addison v. Duguid, 23d May 1797, (Mor. p. 7079.) Espinasse, Nisi Prius Cases, p. 61 and 62. The claim of salvage is to be liberally interpreted. The obligation of recompense, where one man has bestowed labour and expense, or incurred risk in saving or recovering the goods of another, is one of those which, being formed on natural equity and reason, independent of any express covenant, is enforced by the laws of all civilized countries.—See Stair and Erskine. A claim, therefore, arises at common law from such an act, which, when the case occurs, must of course be an insurable interest. Neither is it enough to say, that the claim can only be made effectual if the goods are in fact brought safe on board, and that it ceases when, by any after occurrence, they are again lost: for, in the question of insurance, we must take circumstances as they stand, when the insurance and the risk of subsequent loss is the very thing insured against. Thus, suppose the capturing vessel had been provided with a letter of mark on board, or suppose the recapture had been made by a king's ship, the after loss of the subject would have been no objection to the insurance.

"Supposing the claim, in this case, to belong to the king, for want

1806.

SMITH, & CO.
v.
YELTON, & CO.

Pleaded by the Appellants.—The respondents had not such an interest in the subject matter of the insurance as is insurable by law; but the said insurance is null and void by 19 Geo. II. c. 37, which declares, that if “any person or persons, bodies corporate or politic, on any ship or ships belonging to his Majesty, or any of his subjects, or any goods, merchandizes, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without farther proof of interest than the policy; or by way of gaming or wagering, or without benefit of salvage to the assurer, and that every such insurance shall be null and void to all intents and purposes.” The policy is, besides, imperfect and inept, as it contains no description of the voyage, nor of the commencement or termination of the risk insured against. And the warranty that the ship was then in Norway at the time of the insurance appears not to have been true. Further, even supposing the policy attached, yet no more could be demanded than the propor—

of the letter of mark, and that the salvage was to be considered as ~~the~~ droit of admiralty, still the question would remain, whether, out ~~of~~ the king's share, the actual salvors would not have a claim of recompense? and whether this is not an insurable interest? Suppose ~~they~~ had brought in an enemy's ship, this might have been claimed on ~~be~~ half of the king as a droit of admiralty, but subject to the claim ~~of~~ recompense, which justly belongs to those who have been instrumental in acquiring this very interest for the king. But the insurers have no right to set up a question of this kind between the king and the captors. *Palmer v. Hutton*, 3d Feb. 1784. (Mor. 9569); case of the Orma Prizes. Who is entitled to say this is illegal? The most plausible argument is, that it remains in suspense till the ship is safely brought in; and then, if the king takes her, or if the owner appears, the claim of recompense arises. But still, why should not an eventual claim be insurable? It would not be a wagering policy.”

LORD HERMAND.—“I think there is no legal claim of salvage here, and therefore no insurable interest. Recompense is given from liberality.”

LORD CRAIG.—“I think the interlocutor is right on the statute; but still there is a claim of recompense; and I think that claim ~~was~~ insurable.”

LORD MEADOWBANK.—“I am of the same opinion. Had ~~the~~ the ship been brought in, perhaps the king might have claimed; but this would have been subject to the claim of salvage or recompense.”

LORD BANNATYNE.—“This was not a lawful act (insuring such an interest.)”

tion, or actual interest that the owners of the *Diana* had in the salvage, bore to the sums assured, and not to the whole sum of £400 subscribed in the policy.

1806.

SMITH, &c.

v.
YELTON, &c.

Pleaded for the Respondents.—That the recapture made by the vessel *Diana* was an act, not contrary to the law, and that, in consequence thereof, they did acquire a certain interest in the ship and cargo so recaptured, and which created, in a certain event, a contingent claim against the owners for a just and equitable remuneration. That the interest acquired by the respondents was of such a nature as entitled them to insure the same, against those risks which might occur to prevent them from obtaining the just remuneration for their risk and trouble; and that in no respect can the policy here entered into be considered as a gaming policy, struck at by the statute Geo. II.

After hearing counsel, it was

Ordered and adjudged as follows: The Lords find, That the terms in which the salvage is described in the policy of insurance, as the subject upon which the insurance is declared to have been made, are such in their construction, that the policy must be considered as inept and void; and find, that it is unnecessary to determine upon any question which it might have been necessary to decide, if the subject upon which the insurance is declared in the policy to have been made, had been described in other terms; and it is therefore ordered and adjudged that the cause be remitted to the Court of Session to review their interlocutors complained of, and to proceed consistent with this finding.

For Appellants, *M. Nolan, James Reddie.*

For Respondents, *William Adam, David Williamson.*

1806.	The Reverend Mr. ROBERT RENNIE, Minister of the Gospel at Borrowstounness,	} <i>Appell</i>
RENNIE v. TOD, &c.	JAMES TOD, ALEX. COWAN, JOHN COWAN, JAMES SMITH, Merchants; ALEX. AITKEN, Feuar; JOHN HARDIE, Baker; and FRANCIS LINDSAY, Barber; all of Borrowstounness, describing themselves as Representatives of the inhabitants of the said town,	
		} <i>Respon</i>

House of Lords, 21st July 1806.

TRUST USES—MORTIFICATION—MINISTER'S STIPEND—IMMUTABLE USAGE—RES JUDICATA.—1. A fund had been raised and vested in trust for behoof of the minister of the Borrowstounness. At the time, the annual produce of it did not amount to the minimum stipend of 800 merks, but was obtained by act of Parliament to assess the inhabitants to make up this to 800 merks. Afterwards, the value of it increased, so as to leave a large surplus over, after paying the minister the 800 merks, and other repairs of the church, &c. inhabitants sought to appropriate this surplus to other purposes and pleaded that they had been in the immemorial usage so with the fund; Held that they could not do this, and the surplus belonged to the minister, reversing the judgment of the Court of Session. 2. Also held that a former decree of the Court of Session, regulating the appropriation of what was the whole fund, did not bar the present question, which was to determine the right to the annual surplus that had since accrued by the increase of the stock.

Certain funds were raised, from various sources, for the behoof of the minister serving the cure of the church of Borrowstounness, at the time when that town was disjoined from the parish of Kinneil, of which it formed a part.

The chief part of the stock consisted of 5000 merks upon wadset to Mr. Hamilton over the lands of Muir and a bond for the prices of the seats conveyed to the church. These were accumulated into one fund in the seventeenth century, and vested in "four persons, as missionaries for the inhabitants of Borrowstounness, for the use, utility, and behoof of the minister and his successors, the servers of the cure at the kirk of Borrowstounness."

At first, the funds fell short of the minimum allowance to a minister serving the cure of a parish, which was 800 merks or 8 chalders, but application being made to Parliament for the erection of the church into a separate parish, an act was passed, granting "power to those whom the suppl

" (inhabitants of Borrowstounness) have chosen to be assisting to the kirk session, according to the act of Parliament, or some other who shall be nominate, be common consent of the town and session, to stent yearly every inhabitant and every indweller within the parish, according to their abilities, for making up the yearly stipend of 800 merks, promised and obliged to be paid by the supplicants to the minister and his successors in the said charge."

1806.

RENNIE
v
TOD, &c.

The obligation of making up the deficiency thus lay on the inhabitants, which was done for many years by an assessment on them. Various changes took place as to the management of the funds. Under a charter from Cromwell, the management was vested in the minister, but afterwards, that act being superseded, it came to be managed not altogether by representatives of the town only, nor by representatives elected by the town and kirk-session jointly, but either by the kirk-session in conjunction with " those whom the inhabitants had chosen to be assisting to the kirk-session," or by some others who were nominated by common consent of town and session.

But, in the year 1756, the funds had arrived at such a state of productiveness, that the whole stock, including the lands of Muirhouse, Duke of Hamilton's bond, bond for the prices of seats in the church, and the seat rents, which were let from year to year, yielded annually a sum rather exceeding 800 merks.

For a long period of years previously, the seat rents had not been dealt with as a part of the common stock for providing the minister's stipend, but had been entirely set apart and appropriated for repairing the church and churchyard dikes, and to some other similar purposes; and the managers had therefore been obliged to levy, by assessment, a sum necessary to make up the 800 merks, independent of the seat rents that were so expended.

But questions arising as to this management, and as to the rights of parties under the improved state of the funds, actions were raised by Ritchie and others, inhabitants of Borrowstounness, and members of the Incorporated Sea Box Company on the one part, and by the minister and kirk session, and the representatives of the town, &c., on the other.

The objects of Ritchie and others, by their action, were, 1st. To recover that share in the election of the assistants or representatives, which had been given them by the act of parliament 1649; and, 2d. To put an end to the annual assessments, now that the fund was sufficiently productive of

1806. itself to yield the requisite stipend required by law, and therefore to have it declared that the stock did already yield 800 merks; and that the funds could not be applied to any other purpose than the payment of stipend.

RENNIE
v.
TOD, &c.

On the other hand, the minister and kirk-session, and their assistants, believing that the seat rents made no part of the stock, brought their action to have it declared, that the assessment should be continued until the proper mortified stock, independent of the seat rents, should yield an annual produce of 800 merks. They raised another action against the Duke of Hamilton, to ascertain (if it should be found that the seat rents could not be so applied) who were the parties liable for the expenses of repairing the church and church yard dikes.

Aug. 16, 1764. These actions being conjoined, a decree was pronounced, finding the management of the funds was vested in the representatives or assistants to be elected by the inhabitants, in conjunction with the minister and kirk-session, and regulating the mode of election, and finding " the following subjects to be funds falling under the administration of the said assistants or representatives of Borrowstounness, viz. 200 pounds Scots, as the victual and money rent of the lands of *Muirhouse*; 295 pounds like money, being what is payable by the mortification bonds granted by the inhabitants of Borrowstounness for the arrears of their seats at the building of the said kirk; the interest of the Duke of Hamilton's bond, being 83 pounds Scots yearly; 89 pounds four shillings Scots, being the seat rents in the body of the church and range; 60 pounds Scots, as the money arising yearly from ringing the great bell, and sales of burying places, and the rent of the house called the manse; and that the said assistants or representatives are to be accountable therefor in the usual manner of administrators: Find that the said assistants or representatives, or their successors, have no power to stent or tax the inhabitants thereof at present, nor in time coming, except in the case of the failure or decrease of the said stock or funds, so as the annual produce thereof shall not be sufficient for answering the said 800 merks of stipend to the minister of Borrowstounness, and then allenarly to such extent as may make up the deficiency, so as the annual proceeds of the stock may yield the said 800 merks Scots of stipend: Find that the rents of the lands of *Muirhouse*, the annual rents of the bonds, and rents of the seats in the church of Borrowstounness, specially appropriated for

"the payment of the said stipend, must, in the first place, be applied for that purpose: Find that the said funds, after payment of the said stipend, must be applied for payment of the repairs of that part of the church possessed by the inhabitants of Borrowstounness, and for keeping the dykes of the lower church yard of Borrowstounness in repair: and that the said representatives may make payment out of the said funds to the collector thereof, of an yearly salary not exceeding £3 Sterling, without prejudice, nevertheless, to the said John Ritchie, and the other members of the incorporated Sea Box of Borrowstounness, to insist for payment of any debt that may be due to them by the assistants, out of the surplus of the said funds, after payment of the said stipend only; and reserving all defences competent against such debts; and find, that none of the funds under the administration of the assistants, can be applied by them in repairing the kirk yard dykes of Borrowstounness, (except the dykes of the lower church yards), or for payment of the manse rent, schoolmaster's salary, or bellman's salary."

1806.

RENNIE
v.
TOD, &c.

In the year 1768, a lease of the wadset lands of *Muirhouse*, which, in the interval, had become vested in them as an absolute right, was granted for 38 years, with consent of the minister. The granters of the lease were thus described: "John Addison, merchant in Borrowstounness, for himself and as one of the elders and members of the kirk-session of the parish of Borrowstounness, and as treasurer for, and in name and behalf of the minister and hail other members of the said kirk-session, and also of their assistants, trustee, and managers of the funds appropriated for payment of the stipend to the minister of the said parish of Borrowstounness, heritable proprietors, &c."

From the decree of 1764, till the year 1786, the funds were managed by assistants chosen in terms of it, who consulted with the minister as a joint administrator. During that period, there was no surplus beyond the 800 merks, except what was exhausted by the several objects provided by the decree 1764. The repairs of the church, church yard dikes, collector's salary, and John Ritchie's expenses in the process, amounting to £200, exhausted the funds produced beyond the minimum of the minister's stipend.

In 1786, however, a considerable increase arose in the stock. There was a surplus in the managers' hands of £300; and, as the lease was to expire in a few years, there was a certain prospect of a still farther increase. In the meantime,

1806. the respondents had been in the practice of applying the surplus of these funds to other public uses in the town.

RENNIE
v.
TOD, &c.

But the appellant, as minister of the church, conceiving that he was entitled to the whole surplus produce of the funds so provided, and particularly to the whole rents of the lands of Muirhouse, raised action to have it found and declared accordingly. The defence pleaded to this action was, *First*, That by immemorial usage these funds had been appropriated to other uses than the payment of the minister's stipend; and, *Second*, That the matter was *res judicata* by the former decree.

Jan. 13, 1801. Lord Hermand, Ordinary, held the minister entitled to the whole surplus. On reclaiming petition, the Lords pronounced

Jan. 14, 1802. ed this interlocutor:—"Alter the interlocutors reclaimed against, find the respondent, the minister (appellant) has no right to the surplus fund in question, claimed by him; therefore assoilzie the petitioners, and decern." On further petition the Court adhered.

Feb. 12, 1802.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded by the Appellant.—From the original deeds, it is clear that the funds raised by the inhabitants of Borrowstounness, to make up a stock for to pay the "minister and his successors their stipends," were laid out upon certain securities, in the names of trustees or administrators, and that those trustees had the power of administration of the funds, but the trusts were, in these deeds, specially declared, and bore expressly to be, "*for the use, utility, and behoof of a minister and his successors, servers of the cure at the kirk of Borrowstounness.*" In particular, the lands of Muirhouse having been held upon these trusts, on feudal titles, for 130 years, the minister's right in the use thereof, is now settled by positive prescription, even though he had no other title to found on.

In addition to the funds so absolutely settled, "for the use, utility, and behoof of the minister," which did not at the time produce the necessary yearly income of 800 merks, being the minimum of the stipend, on which, by the act of Parliament of Scotland 1633, c. 8, a minister could be settled, the inhabitants came under an additional obligation to stent or assess themselves annually in a sum sufficient to make up this minimum of stipend, or 800 merks per annum; but there is nothing in this original transaction, from which it can be shown or inferred, that the inhabitants of Borrowstounness meant to restrict the stipend to the minimum in all time coming, and to reserve to themselves the surplus of

the mortified funds, to be appropriated to any purpose that they might think proper. There is no such restriction in the deed, and such restriction would have been quite inconsistent with its nature, and unprecedented in mortification for such objects. The minimum is only a point *a quo* is calculated a stipend, until it reaches the *maximum*. This *maximum* is implied in the *minimum*, and it is of the very nature of mortification itself, that the stipend drawn thence does increase with the stock, which is wholly mortified and set apart for that particular purpose. The fund from which this increase solely arises is the wadset right of the lands of Muirhouse, and it bears expressly to be for the "use, utility, and behoof of a minister and his successors." The decree in 1764 is not a *res judicata* to bar the present action. That decree decided quite different matters. It is true, it directs the stipend of 800 merks to be paid in the first place, then directs the repairs of the church and church yard dikes, collector's salary, &c., to be paid. But as to what remained, after completing all these purposes, the decree is silent. And it is precisely as to this surplus, after completing all these purposes, that the present question is raised, and which, it is maintained, belongs to the minister. And no usage, however inveterate, and no expediency, however urgent, can sanction an appropriation of this fund to other and different purposes.

Pleaded for the Respondents.—At the erection of the town of Borrowstounness into a separate parish, in the middle of the 17th century, it was stipulated, by the terms of the foundation, or original contract entered into between the parties, that there should be paid to the minister, by the inhabitants of the town, a specific and fixed stipend of 800 merks only; as appears from the act of parliament 1649, which is the foundation, and must be the measure, both of the right it bestows on the minister, and the obligation it imposes on the inhabitants. This statute being the *regula regulans*, entitles the minister to no more than 800 merks; and whatever surplus there is over, the inhabitants are entitled, after satisfying their obligation to the minister, to appropriate these funds to town purposes; because, when the nature of these funds, and the right taken thereto, are considered, it is perfectly clear that the property of them was never vested in the minister, but that it remained with the inhabitants, subject only to payment of the minister's stipend. The funds from which the increase chiefly arises was originally a wadset, purchased by the inhabitants' money; it was afterwards converted into an absolute right

1806.

RENNIE
v.
TOD, &c.

1806.
 ———
 BENNIE
 v.
 TOD, &c.

of landed property, consisting of the lands of Muirhouse, devoted to the payment of 800 merks only to the minister. But the future increase of this, or of the Duke of Hamilton's bond, or the bond for the seats and the seat rents, were not conveyed to the minister, whatever they might amount to, but only in so far as they guaranteed to him payment of 800 merks, and no further. Accordingly, the immemorial usage and practice, ever since the erection of the church, has been conformable thereto. At no time has the minister drawn a penny from these funds more than his 800 merks; and the surplus, when there was any, was always applied to other public uses. This usage, supported by the most obvious expediency, is of itself decisive of the question. Besides, the decree in 1764, in its import and substance, is a *res judicata* foreclosing entirely the present question. It "found and declared that the rents of the lands of Muir-house, the interest of the bonds, and the rents of the seats in the church of Borrowstounness, specially appropriated for payment of the said stipend, must, in *the first place*, be applied for that purpose." These words, "*in the first place*," are decisive, and necessarily imply that the funds *quoad ultra* are applicable to other purposes, under the power of those intrusted to manage them.

After hearing counsel,

THE LORD CHANCELLOR ERSKINE said,—

"My Lords,

"To make the present cause intelligible, I must state briefly the circumstances which have given rise to it.

"In 1632, the inhabitants of Bo'ness resolved to have their town disjoined from the parish of Kinneil. In 1638, the church was built, and a stock was raised by contribution, but in what manner does not appear, for the support of a minister and his successors. It was strongly insisted for the respondents, that the parties never meant that this provision to the minister should exceed 800 merks per annum: but, at that time, it is to be noticed that there was no fixed minimum of 800 merks. The probability is, that the parties never imagined that their stock could produce more than 800 merks per annum.

"In 1648, it appears that 5000 merks of this stock were lent out to a gentleman of the name of Hamilton, who, with his wife, granted a wadset for the same, over certain lands therein mentioned, to certain persons, as commissioners for the inhabitants of Bo'ness and his successors, "for the use, utility, and behoof of any minister and his successors, servers of the cure at the kirk of Bo'ness." After this follow all the usual clauses of form. This contract was followed with charters in the same terms.

" In 1649, an act of the Scots Parliament was obtained, in which, after disjoining the parish of Bo'ness, power was given to certain persons therein pointed out, to stent every inhabitant of the parish, for making up the yearly stipend of 800 merks, promised and obliged to be paid to the minister and his successors, " ay and while the annual rent of the supplicants, their stock, extend to the sum of 800 merks yearly."

" The respondents strongly insisted that, under this act of Parliament, it appeared, that only 800 merks a year in all, was to be paid to the minister. But it must be recollected, that the minimum by law at that time came up to that amount, and that the act of Parliament gave right to tax the inhabitants till the annual rent of the stock provided for the sustenance of the minister should come up to the minimum ; but the power of taxing would not alter the character of the original trust.

" If I give an estate to my eldest son, as trustee for a younger brother, and add an obligation on the eldest son to make up the estate to £1000 a year, nothing can show more clearly my intention than that my second son was to possess £1000 a year ; and though, perhaps, it might not be in my contemplation that the estate would ever produce so much, yet if the estate came to be of greater annual value than £1000 a year, could it be said that the eldest son was not still a trustee in that specific estate for his brother ?

" It is not necessary, at present, to mention any other of the funds except the wadset ; what other funds there were, appears from the decree in 1764, to be afterwards mentioned.

" I may here mention the instrument said to have been found among the papers of the town of Bo'ness, namely, the copy of the contract 1655. This is argued on by the respondents as much in their favour. I lay this instrument altogether out of sight, as ruling the right to the wadset. Mr. Wauch, the minister at that period, thought that he, though the *cestui qui* trust, had a right to infeftment in the lands, which had, by an apprizing obtained in 1653, become irredeemably vested in the trustees. Mr. Wauch accordingly obtained a charter from Cromwell, and was infeft in his own absolute right for himself and his successors, ministers of Bo'ness.

" Afterwards, those entitled to the administration, and who certainly had an interest to take the management into their own hands, on account of the assessment which still continued, applied to and obtained from King Charles the II. a charter restoring to them the possession and administration.

" A circumstance in this transaction makes an impression on my mind ; when they expeded (as it is termed) this charter, they knew they were contending with an usurpation ; and if they then conceived that they had a right to the surplus of the funds, after producing the 800 merks, they might have qualified the trust on the face of the instruments. The minister considered the trust as abso-

1806.

RENNIE

"
TOD, &c.

1806.

RENNIE

v.

TOD, &c.

lute. The whole matter was before them ; they were actors, and yet take the charter in these terms, ' for the use and behoof of the ' minister of the gospel, serving the cure at the kirk of Borrowstounness,' &c., without qualification or limitation, but absolute and unlimited. The sasine was in similar terms, being a corollary from the charter. Thus, we see a complete instrument taken out by themselves, and taken precisely in the language of the original wadset.

" I was nevertheless at first impressed with the argument of the respondents, drawn from the decree 1764. If it had been decided at that time that the minister had only a right to the 800 merks, it must now have so stood ; but that was not the case. That action was brought for the purpose of ascertaining what funds were applicable to the payment of the minister's stipend. At that time it was not in the contemplation of the Court to consider if the minister had a right to the surplus or not. No question of that kind was agitated till the present question arose.

" The appellant became minister in 1795 ; he brought an action upon this point before the Court of Session. The conclusions of his summons were. (Here his Lordship read the same).

" When the action came before Lord Hermand, as Ordinary, his Lordship, on the 31st of January 1801, pronounced this interlocutor. (Here his Lordship read the same).

" This interlocutor was in favour of the minister ; and I think that in a case of this kind, one judge was as competent to form an opinion as several. I think that his judgment was what was sound and just in this case. Unquestionably, in this country, a court cannot look off the face of the instruments constituting the trust right. I speak, subject to the opinion of my noble and learned friend.

Lord Eldon.

" But it became necessary to see if some other rule of law on this subject did not obtain in Scotland. I find that it is quite the contrary, and that, in a recent case, *Duggan v. Wight*, in a case of alleged trust, the Court refused to look off the face of the instruments, or to listen to anything short of the statutory proof of trust. This case, though on a different point from the present, shows me that the rule of law is the same in both countries.

Ante vol. iii.
p. 610.

" Upon the whole, my opinion is, that the interlocutors of the Court here appealed from should be reversed."

LORD ELDON said.—" His Lordship having done me the honour of referring this question to me, my opinion has been formed on the perusal of the printed papers in this cause.

" It is a question of some doubt on the evidence, whether certain funds, appropriated for payment of the minister's stipend, were so appropriated in security of a fixed stipend of 800 merks ; or, whether these funds, which did not then, but now do, produce 800 merks and more, were not absolutely settled on the minister.

" In all human probability, neither the inhabitants nor the minister at the time thought that the produce of the funds would ever amount to more than 800 merks ; but this can never decide the rights of parties. If an estate of only £40 a year value is settled for the support of a minister, and an obligation entered into to make this estate worth £80 a year to him, even though the deed was so framed that the understanding of the parties was apparent, that the estate would never amount to more than £80 a year, yet, if it ever did, in such a case, the increase would go to the minister.

" In this case, the bonds for the first rents were taken ' to make up ' a stock for the minister and his successors, their stipenda.' Five thousand merks, which had been raised, were lent to Mr. Alexander Hamilton, for which a wadset over the lands of Muirhouse was granted to certain persons, ' for the use, utility, and behoof of a minister,' &c. On this wadset, a decree of apprizing was obtained in 1653, which was never redeemed, and the wadset has now become an absolute right. It cannot be maintained for a single moment, that where the wadset was granted in the terms I have stated, that a decree obtained thereon for apprizing the lands, could alter the nature of the rights, so as to give that to the trustees for other uses, which had been settled to the use of the minister.

" It is to be noticed, that this wadset was taken before the act of Parliament was passed, stating a minimum of stipend. The difficulty is, that it was clearly the intention of parties to provide the minister in a salary of 800 merks a-year, but as the funds did not produce so much, it was contended that the wadset and decree of apprizing were merely in security of this stipend of 800 merks.

" In 1649, an act of Parliament was passed for erecting the new parish. It appears to have been the object of that act that the minister should be secured in his minimum of 800 merks ; and it gives power to the inhabitants to stent themselves till the stock should produce so much ; but I see nothing in this act of Parliament, in the law, or in the state of the titles at that time, to authorize me to say, that if the funds at that time had produced more than 800 merks, then the surplus should not go to the minister. The power of stenting was to cease when the produce of the stock amounted to 800 merks a year ; but the act of Parliament says no more.

" When I look at the contract in 1655, the charter of Cromwell thereon, and the last charter in 1676, with regard to the lands over which the wadset had been originally granted, it appears to me that the fair construction to be drawn from these is, that the funds were, if not mortified to the minister, yet appropriated to his use and benefit, in terms so clear on the face of the instruments, that we cannot, at this distance of time, look off these instruments, to speculate with regard to the original intention of the parties.

" It was said, that as the minister could not lose by any dilapidation of the funds, he ought not to gain by any rise therein ; but

1806.

RENNIE
v.
TOD, &c.

1806.

this is not a case of bargain, but of conveyance, and the true construction of the instruments in question.

RENNIE
v
TOD, &c.

" My chief difficulty is on the decree 1764; it was contended that this was a *res judicata*—a decision how the surplus was to be disposed of. But, on the best consideration I can give this matter I think the decree will not bear this construction. At the time the charter 1676 was granted, it is very remarkable, if the inhabitants thought this a trust for themselves, and while they were contesting in whom the right of administration should be, that they should have taken the charter absolutely ' for the use and behoof of the minister.' Though, by the decree in 1764, the minister suffered some part of the produce to be applied to other purposes, how came they not therein to declare the ultimate use of the fund, after paying the 800 merks to the minister, and other purposes therein specially stated ?

" With respect to the right of administration, there is no dispute here. It appears, that while there was no surplus, the administration was sometimes in one party, sometimes in another, sometime one object of regard, sometimes of none; but when it was an object of regard, it was merely to keep from stenting improperly the inhabitants. This decree must now be of force as far as it has adjudged; but as it has said nothing of the ultimate disposal of the surplus of the funds, I see no way of disposing of it but as the Lord Ordinary did, by looking back to the original deeds."

(His Lordship here read the form in which he proposed that the judgment should be, which was ordered accordingly).

It was ordered and adjudged that the interlocutors complained of be reversed; and find, that the pursuer is entitled to the annual surplus of the funds in question after answering the purposes mentioned in the decree of the Court, dated 10th August 1764. And it is further ordered that the cause be remitted to the Court of Session.

For Appellant, *Wm. Adam, Wm. Robertson, James Moncrief*

For Respondents, *Wm. Alexander, Ad. Gillies.*

NOTE.—Unreported in the Court of Session.

ROBERT HENDERSON of Cluigh-Heads, Esq.,	<i>Appellant;</i>	1806.
ROBERT RAMSAY and FRANCIS MAXWELL.	} <i>Respondents.</i>	HENDERSON v. RAMSAY, &C.
Writers in Dumfries, Assignees & Arrest- ing Creditors of deceased Arch. Malcolm,		

House of Lords, 22d July 1806.

SEPTENNIAL PRESCRIPTION—OBLIGATION OF RELIEF—ERROR IN FACT AND LAW.—Circumstances in which the cautioner in a bond was held entitled to relief against one, who came under an obligation to relieve him after the expiry of the period of the septennial limitation; and this, though the obligation was granted in ignorance of the fact and law, that the bond was gone as a valid bond against the cautioner, in respect of the septennial limitation.

Action of relief was raised in the following circumstances : A bond was granted by Alexander Orr, W.S., to Mrs. Murray of Murraythwaite for £1333, being her share of the deceased Mr. Dalrymple's succession, to which she succeeded as one of three heir-portioners. The bond was dated 26th and 29th July 1766, and was made payable at the term of Martinmas next to come, that is, 11th November 1766. It bore to be granted by Alexander Orr as principal, and "William Hay of Craufurdston, W.S., and Archibald Malcolm of Auldgirth, Writer in Dumfries, as cautioners, sureties, and full debtors with, and for me." And there was a clause of relief in this bond, obliging Alexander Orr to free and relieve his said cautioners.

This cautionary obligation was, under the statute 1695, c. 5 (septennial limitation), at an end upon the 29th July 1773. Under the impression, however, that it continued in force until the term of Martinmas, 11th Nov. 1773, the cautioners, Hay and Malcolm, entered into a new obligation in the month of October of this year, to the effect that the bond Oct. 22, 1773. should continue to have the same force *after* the term of Martinmas as it had *before it*. The obligation narrates the bond, and sets forth, "Therefore, to prevent any such diligence being used for the purpose aforesaid, we do hereby declare that the said bond shall continue in force, and be effectual against us and our aforesaid, as well after the term of Martinmas next, as before the same, aye and until the sums contained in, and due by the bond, are paid."

Thereafter Malcolm, one of the cautioners, applied to Mr. Orr to be relieved of his cautionary, whereupon the father of the appellant, Mr. Henderson, of this date, granted a let- Nov. 13, 1773. ter, promising and engaging "to free and relieve you of the

1806. " same, and of every consequence thereof, in the same man-
 ————— ner as you had never been bound therein ; and I shall,
 HENDERSON " when required, execute a formal bond of relief in your fa-
 v. " vour of the same, as the said Alexander Orr has given me
 RAMSAY, &C. " relief for this my engagement to you."

This letter did not refer or narrate the above obligation granted by the cautioners of 22d Oct. 1773, but only the bond itself.

1779. It seems that Mr. Malcolm, who was then relieved of his obligation, had always acted in the capacity of confidential agent and legal adviser. After her death, Mrs. Murray's son raised, in 1779, action against Malcolm, and the heir of Mr. Hay, who was dead, for payment of this bond, in which, having obtained decree therein, the amount of the bond was paid by Malcolm. No defence of prescription was stated by Malcolm to this action. This action was intimated under protest by Malcolm to Mr. Henderson ; and action of relief was at same time raised against him before the Court of Session, in which various procedure took place, and where some claims of compensation were stated.

This action was allowed to fall asleep, and was revived in 1784 ; and afterwards dropped. Another action was raised by Malcolm against Orr's representatives, and the representatives of Hay, the other cautioner, having in view to ascertain his counter claims against Orr's estate ; but, as against Orr's estate, no decree followed.

Mr. Orr, the original debtor, was dead and bankrupt, Mr. Hay was also dead and bankrupt ; Mr. Malcolm, the other cautioner, died, leaving his affairs in great confusion. The action of relief raised by him, and allowed to fall asleep, was, after his death, revived by the respondents, Messrs. Ramsay and Maxwell, his sons in law.

The Lord Ordinary (Swinton) pronounced this interlocu-
 July 11, 1798. tor, after discussion on the merits :—" In respect the cau-
 " tionary obligation of Messrs. Hay and Malcolm, contained
 " in their original bond, along with Mr. Orr as principal,
 " expired in July 1773, and that the renewal of cautionary
 " granted by Hay and Malcolm in October 1773, proceeds
 " on the mistake that the septennial prescription was not
 " then expired, and therefore was not binding on them ;
 " finds Mr. Henderson's missive of relief to Mr. Malcolm in
 " Nov. 1773, could not bind Mr. Henderson to make any pay-
 " ment to Mr. Malcolm, who was not himself bound effec-
 " tually ; therefore sustains Mr. Henderson's defence, and
 " assoilzies him from the action."

The respondents then raised their action of repetition against Mr. Murray, who had, in the meantime, received payment of the bond as above mentioned. In this action of repetition, which went before a different Lord Ordinary, (Bannatyne), it was stated in defence, 1. That Mr. Malcolm was barred from pleading prescription under the act 1695, because he was the confidential friend and legal adviser of Mrs. Murray, upon whom she relied in that business, and he was not therefore entitled to avail himself of an omission which he was bound to inform her of. 2. Mr. Murray stated a variety of transactions, which took place after he made this claim against Mr. Malcolm, which he maintained were sufficient to bar an action of repetition, even if otherwise well founded.

1806.

HENDERSON
v.
RAMSAY, & CO.

Informations were ordered to the Court on both actions. In the action of repetition, the Court sustained Mr. Murray's May 27, 1802. defence against repetition brought by the respondents, and absolved him from the conclusions of the action. In the action of relief, the Court, of this date, altered the interlocutor of the Lord Ordinary, 11th July 1798, and found "the May 27, and June 1, 1802. defender, Robert Henderson, liable to relieve the pursuers of the debt libelled, originally due by Alexander Orr to Mr. Murray, for which Archibald Malcolm was a cautioner by the original bond, and renewed obligation libelled, in consequence of which he was found liable for, and obliged to pay the sums in question." On reclaiming petition the Court adhered.

Against the interlocutors of 27th May and 1st June 1802, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The engagement undertaken by the appellant was not that come under by Mr. Malcolm and Mr. Hay, by their declaration executed in October 1773. This engagement was not varied by his letter of the 17th November 1773, for though that letter is affixed to a copy of the declaration executed by Mr. Malcolm and Mr. Hay, yet the appellant thereby promises only to relieve Mr. Malcolm, in terms of his missive to him on the subject "matter thereof on the 13th current." The appellant's letter of 13th Nov. 1773 refers merely to the bond of cautionary obligation in which the appellant engaged to free and relieve Mr. Malcolm. This letter, therefore, of the 13th Nov. is the extent and measure of the appellant's obligation, and the undertaking is to relieve Mr. Malcolm of his cautionary obligation on the bond; but the bond being at that moment gone as a bond against the cautioners, by

1806.
 ———
 HENDERSON
 v.
 RAMSAY, &c.

operation of the septennial limitation, there was nothing upon which the appellant's undertaking could operate; and the subsequent writing in Oct. 1773, by which it is attempted to be shown that the original bond was revived, did not revive the bond, because it proceeded on the erroneous narrative of an error in fact and law, that the original bond was then in force, and did not expire or prescribe until the Martinmas term thereafter, whereas it was at that moment expired. As, therefore, the respondents could recover nothing upon the bond, except upon the footing that the bond was still a subsisting obligation, the moment it ceased by prescription, it ceased to be binding to any legal effect against the cautioners under the act 1695. Besides, it did not revive the obligation, it only purported to continue it such as it was; and there being at the time no obligation existing, so there was none to continue. Nor is any answer to this to say, that the appellant ought to have stated this objection at the time when Mr. Murray's action was intimated to him, or, in the first instance, in defence of the action of relief, because he could not have done so, the defence stated to that action being a preliminary one. As the objection here urged was one which, in law, could not be stated at any time. Separately, the respondents could recover nothing from the appellant unless upon the footing that Mr. Orr being indebted to Mr. Malcolm; but, so far from Mr. Orr being indebted to Mr. Malcolm, the presumption arose, from the circumstances which had taken place, that Mr. Malcolm was indebted to Mr. Orr in a sum beyond that for which relief is now sought against the appellant.

Pleaded for the Respondents.—1. The payment by the respondents' author Malcolm, in consequence of his cautionary obligation for Orr, the principal debtor, was a necessary consequence of their engagement, and of the decrees and documents which followed in relation to it; for, beyond all doubt, one unavoidable consequence of the renewal of the obligation was, that the creditor might prosecute the bond, and might try the question of its validity in court of law. And the decision in the question of repetition at the respondents' instance against Murray has shown that the respondents did their utmost, both for themselves and for the appellant, to set aside the cautionary obligation together, and to obtain indemnity for the loss incurred by that engagement. How can it avail the appellant to plead that the interlocutors of the Court of Session, in a question between the respondents and Murray, have been erroneous

since it is obvious that, supposing his opinion of the sentences of that Court to be well founded, the parties were, nevertheless, liable to suffer by any involuntary error of their judges; and this, too, was a necessary consequence of the renewed engagement of cautionary, the validity of which came to be raised before the Court of Session. 2. The appellant's obligation to relieve Malcolm from Orr's bond, in which he was a cautioner, was pure and unqualified, and did extend to every consequence of the principal obligation of cautionary. The appellant thereby "promised and engaged to free and relieve Malcolm of his cautionary obligation,"—"and of every consequence thereof, in the same manner as if he had never been bound therein." When the appellant became bound in Orr's bond to relieve Malcolm, it was to avoid prosecution on Orr's obligation. There was then in view two things—a certainty of the obligation coming against the cautioners, and, secondly, its prescription. 3. It has been seen, that on *the very day* when Malcolm was first cited to pay the cautionary debt, the appellant was served on same day with a notarial protest, requiring him, in terms of his obligation of relief, to relieve him. The appellant's answer amounted to this, "I admit that I am bound to relieve you, but pay the creditors in the meantime, and I will settle accounts with you afterwards." This was the gist of his language. But the appellant could not plead compensation upon the counter claims which he alleged that Orr, the common debtor, possessed against Malcolm, and defend himself as he did in the character of creditor to Orr, without admitting his own obligation of relief to be effectual. In the former action, he only stated his defence of compensation, and no one can do this without admitting the justness of the debt. Nothing was pleaded about prescription, and even if competent at all, it is now too late. The appellant ought to have stated his objection at the time when Mrs. Murray's action was intimated to him, or, in the first instance, in his defence to the action of relief, which was allowed to fall asleep, and in which alone the plea of compensation was stated.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *Sam. Romilly, John A. Murray.*

For Respondents, *Wm. Adam, Robert Corbet.*

NOTE.—Unreported in the Court of Session.

1806.

HENDERSON
v.
RAMSAY, & CO.

1807.

MILLIE

v.

MILLIE, &c.

[Fac. Coll. vol. xiii. p. 233 ; et Mor. 8215.]

(First Appeal.)

DAVID MILLIE, Linen Manufacturer in Pathhead, *Appellant* ;ELIZABETH WHYTE, formerly ELIZABETH MIL- } *Respondents.*
LIE, and WILLIAM WHYTE, her Husband, }

(Second Appeal.)

The said ELIZABETH WHYTE, and WM. WHYTE, *Appellants* ;The said DAVID MILLIE, . . . *Respondent.*

House of Lords, 18th March 1807.

LEGITIM—RES JUDICATA.—1. A father, after bestowing provisions upon his children, conveyed all his heritable and moveable estate (a valuable portion of which consisted of a concern, in which the son had been for some years a partner with the father) to his son absolutely, reserving to himself only £100 per annum. He lived three years after this conveyance and died. All the children, except the respondent, had accepted of their provisions as in full of their legitim. In a claim made by the respondent (first appeal) for legitim, as due at her father's death ; Held that the conveyance by the father to the son could not be held as a *bona fide* alienation of his estate, but, from the circumstances, was to be viewed as an alienation devised to defeat the legitim at his death, and, therefore, that the daughter was entitled to her legitim. 2. Held, that the former decree, in regard to the same question, was not a *res judicata*.

Sept. 22, 1791. At first this action was brought by the respondents, Elizabeth Millie or Whyte, with consent of her husband, against the appellant, to reduce and set aside a deed executed in his favour by David Millie, senior, their father, on the ground of imbecility. And also for a share of the goods in communion as at the death of the pursuer's mother. And also for her share in the legitim due on her father's death.

David Millie, senior, of this date, after various deeds, executed a general disposition, by which he instantly assigned, conveyed, and made over to his son, the appellant, then engaged with him in business, all and whole my share and interest in the stock of the foresaid copartnery, and whole debts due, and utensils and implements pertaining thereto. As also all and sundry his heritable and moveable effects, together with his whole household furniture, plenishing, and all and sundry debts and sums of money, bonds,

bills, accounts, account debts, &c., with all writs, title-deeds of said heritages, with the whole vouchers and instructions of the same. This deed was granted under burden of his debts, both as a partner with his son and as an individual. Also of £100 to the grantor, payable at two terms in the year, Whitsunday and Martinmas, during all the years of his life; and also of annuities to his daughters *Elizabeth* and *Janet*, and provisions to his children by separate bonds as relative hereto.

The father's estate, at the date of this deed, was supposed to be upwards of £20,000.

Of same date, he executed a bond of provision in favour of his daughters, conceived in these terms:—And “Considering that I have formerly advanced and paid several sums of money to my daughter *Elizabeth Millie*, wife of *William Whyte*, stationer in *Kirkaldy*, and to her said husband, and their children, to the amount of £490, of which £182 was contained in bills to her said husband, and have also, during the twenty-five years last past of their marriage, given them occasionally such support, and even maintained their family in a great measure for ten of these years; and that I have also paid the sum of £150 Sterling of tocher with my daughter *Janet Millie*, wife of *James Barr*, weaver in *Gorbals* of *Glasgow*; and the sum of £200 Sterling with my daughter *Christian Millie*, now deceased, wife of *Thomas Porteous*, minister of the seceding congregation *Milnathort*; and that although the sums paid to my said daughter *Elizabeth Millie*, and her husband, exclusive of the sums I have advanced to some of their children, exceed the proportion of my funds which I have already given, or propose to bestow upon my other daughters or their children, yet, nevertheless, I consider necessary to provide her, and the said *Janet Millie*, my only surviving daughters, in annuities.” Then follows an annuity of £20 per annum to *Elizabeth*, and £370 to her children, and £12 per annum to *Janet*, with £400 to her children. The deed further provided, that these provisions were to be in satisfaction to them and their issue, of all legitim, portion natural, executry, &c.

Mr. Millie, senior, continued to live in family with his son for many years after the execution of this deed, and until his death in Dec. 1795; but, notwithstanding the conveyance of his heritable property, it was stated he continued to uplift the rents of the same himself up to his death; and, subsequent to the deed 1791, it appeared from the co-

1807.

MILLIE
v.
MILLIE, &c.

1795.

1807.

MILLIE

v.

MILLIE, &c.

partnery books that the old copartnery still subsisted, and bills and letters were drawn and written in Millie & Son name down to the day of his death.

All the daughters accepted of their provisions in satisfaction of their legitim, and all they could claim, either by their father or mother's death, except Elizabeth.

Elizabeth claimed her legitim, and also a share of the dead's part of the goods in communion as at her mother's death. Various steps of procedure took place, adopted with the view of adjusting these claims, but without effect.

A submission had been gone into, even before the father's death, in regard to her claims, but was afterwards given up. He was a party to it. And it was alleged that this transaction, to which the son was also a party, was incompatible with the supposition that the deed was absolute and irrevocable, or exclusive of the respondent's rights of legitim.

At first, two actions were raised by the respondents, one to set aside and reduce the deed of 1791, on the ground of incapacity, and fraud and circumvention, and containing a conclusion for £10,000, as Mrs. Whyte's share of the legitim. The other, for payment of one half of the goods in communion as at her mother's death. Defences were lodged to these actions. In the reduction, the term for proving was circumduced *of consent*, and the defender assolized. On June 6, 1797, in regard to the claim for legitim, decree by default, was pronounced for not giving in condescendence. In the other action, decree by default also was pronounced, assolizing the appellant.

Other two actions were brought, the one, for accounting and calling for exhibition of bonds, bills, books, and vouchers belonging to David Millie at his death. The other, an action of reduction to set aside the disposition of 1791, and for payment of her legitim, and for reducing the former decree.

The questions therefore raised were, 1st, Whether the right of legitim can be cut off by any deed executed by the father *in liege poustie* divesting himself, during his own life of his whole moveable and heritable estate, for the avowed purpose of defeating the claim of legitim? And, 2d, Whether such a deed, executed by the father in favour of his son, in the present case, was a *bona fide* disposition, or merely a simulate conveyance of his property?

The appellant rested his defence entirely upon the plea of *res judicata* as barring the action grounded on the decrees in the former actions.

Jan. 13, 1801.

Nov. 27, 1801.

July 6, 1802. After interlocutors of these dates, the first of which repelle

the plea of *res judicata*, on the ground that the one decree was a decree of consent, and the other a decree in absence, and therefore reduced the same, the Lord Ordinary pronounced this interlocutor:—" Finds that the deceased David Millie, father to the pursuer and defender, did, in September 1791, execute a voluntary and gratuitous disposition and conveyance, in favour of his son, the defender, proceeding on the narrative, that for several years past, he had carried on business in partnership with his son, by whose attention and industry their labours had been crowned with success; and it being his intention to continue his residence with his son, where he had lived for so many years past; and having formerly paid considerable sums to his daughters, and by a bond of the same date, had made additional provisions in their favour, therefore, on all these considerations, he conveyed to his son irrevocably the whole of his property, both heritable and moveable, with power to his son to carry on the joint trade in future, either in his own name, or under the firm of David Millie & Son, only reserving an annuity of £100, obliging himself to grant special dispositions to the subjects disposed. That the said David Millie survived the execution of this deed several years: That no inventory of effects, or list of debts due to the said David Millie was ever made out, or any special conveyance executed by him, either to the heritable or moveable property: That no dissolution of the copartnership ever took place; but the trade continued to be carried on under the firm of David Millie & Son: That it is now admitted no part of the annuity of £100 was ever paid to the said David Millie, which, it is now alleged, was allowed by the old man to go in compensation of the entertainment afforded him by his son, although residence in his son's family was one of the inductive causes for granting the disposition 1791: Finds, that in October 1795, a submission was entered into. (Here the abortive submission proceedings were narrated). Finds the pursuer's claim for a proportion of her deceased father's effects, being founded upon the obligation laid upon parents, both by the law of nature and positive institution, to provide for their children, cannot be defeated but by a *bona fide* alienation and transfer of property during the lifetime of the parent: Finds, from what is above stated, and upon the whole circumstances of the case, the voluntary and gratuitous disposition by David Millie, senior, in favour of his son, the defender,

1807.

MILLIE
v.
MILLIE, &c.

1807. "cannot be held as a *bona fide* alienation of his proper
 ——— "but a collusive transaction, devised for the purpose of
 MILLIE "feating the claim of legitim competent to the pursu
 v. "therefore repels the defences founded on this deed, s
 MILLIE, &c. "tains the claim, and appoints the pursuers to lodge a st
 "of the amount of the personal funds belonging to
 "father at the time of his death, and the evidence by wh
 "they mean to establish such state: and allows the
 "fender to see and answer within ten days." On recla
 Feb. 16, 1803. ing petition to the Court the Lords adhered. On furt
 June 7, 1803. petition they adhered.

Against these interlocutors the present appeal was brou
 by the appellant; a second appeal was brought by the resp
 dents, intended as a cross appeal, but, being too late, accord
 to the standing orders of the House, it was allowed to stand
 a second original appeal against the interlocutors in the
 mer actions, which terminated by absolvitor in favour of
 appellant David Millie.

Pleaded for the Appellant.—The plea of *res judicata* :
 bar to the present action, but on this plea the appell
 does not rest his case. The law of Scotland, on the qu
 tion of legitim, is clear; that a father cannot, by a m
 deed, executed on deathbed, nor by a *mortis causa* de
 or a deed of a testamentary nature, defeat his childre
 right to legitim, falling due to him at his death; but,
 though this be the law, it does not follow that the fat
 cannot in any way, or by any deed whatever, disappoint
 legitim. This claim on the part of the children may
 disappointed in various ways. It is due only out of mo
 able estate; and the father may entirely disappoint it,
 converting all his moveables into heritable estate. Beside
 the father, notwithstanding such claim, has entire contr
 over his moveable estate during life; and, if a contrary re
 obtained, then every deed by which the father exercis
 this control over his moveables might be questioned.
 may therefore be disappointed by contracting debts, b
 spending his estate, or by voluntary and gratuitous gifts an
 alienations made in *liege pousie*, such being the law la
 down by the authorities. The deed in question totally a
 absolutely divested the father of his whole property, and th
 estate was vested irrevocably in the appellant several ye
 before his death. It is a fair *bona fide* deed, executed *inter*
vos, absolute and irrevocable in its terms, and was a deliver
 deed; and as the father by it was totally divested, he had
 thing at his death upon which a claim of legitim could atta

The second appeal brought by the respondents, in reference to the decrees of absolvitor in the former actions, was quite unnecessary, as the interlocutor of the Court below has reduced those decrees.

1807.

FORDYCE
v.
GORDON, &c.

Pleaded for the Respondents.—By the law of Scotland the right of legitim cannot be excluded by a deed of a testamentary nature. The deed executed by Mr. Millie, senior, though purporting to be a *bona fide* and absolute transference of property in favour of the appellant, was never carried into effect during the lifetime of the grantor, who continued in full possession of all his property so conveyed, for at least three years subsequent to the date of the deed; and had actually entered into a transaction within a few months of his death, which was utterly exclusive of the validity of the deed 1791 as an absolute and irrevocable conveyance *inter vivos*. This was the submission entered into by him in regard to this daughter's claims, which necessarily implied that this deed could not bar these claims; and that she had not otherwise discharged them. The decision in the House of Lords, in *Lashley v. Hog*, must govern the present question. It is impossible in principle to distinguish that case from the present. The transfer of stock had been made, in that case, to the son, as the conveyance was executed in the present, for the purpose of disappointing the legitim, but old Mr. Hog had continued, notwithstanding the transfer, to receive the dividends, as old Mr. Millie, notwithstanding the conveyance here, continued to receive the rents and profits; and your Lordships found that all such stock, the dividends of which had been so received, was subject to the claim of legitim.

July 16, 1804.
Vide ante, vol.
iv. p. 581.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Sir Sam. Romilly, Wm. Adam, Mat. Ross.*

For Respondents, *Wm. Alexander, Arch. Campbell,*
David Boyle.

ARTHUR DINGWALL FORDYCE, Esq. of Culsh,)
Trustee on the Sequestrated Estate of } Appellant;
John Durno, Advocate in Aberdeen,)
SIR JOHN GORDON of Park, Bart., & ALEX. MOIR, Respondents.

House of Lords, 26th March, 1807.

CONVEYANCE IN SECURITY—ACT 1696, c. 5.—Cautioners for a col-

1807.

 FORDYCE
 v.
 GORDON, &c.

lector of taxes had, on becoming security, procured from him an absolute and irredeemable conveyance of his heritable estate, upon which they were infest. It was admitted by them that they had never entered into possession, and that, in fact, they held the conveyance as a security only for any loss they might incur for the collector's intromissions. On his bankruptcy, his trustee brought a reduction of this conveyance, as granted in security of future debt, and therefore void under the statute 1696, c. 5. Held the conveyance good, and not reducible under the act, it being *ex facie* an absolute and irredeemable disposition. Affirmed in the House of Lords.

Mr. John Durno, Advocate in Aberdeen, was, for many years, Collector of Taxes for the County of Aberdeen, and the respondents were his cautioners in a bond, binding themselves to be responsible for his duly accounting and paying all the amount of taxes collected by him into the public treasury.

He became bankrupt in July 1798, owing of debt to the crown the sum of £6103. 12s. 3d. for arrears of taxes, besides £15000 of personal debt due to other creditors. The bankrupt had heritable property amounting to £6000.

On becoming security for Mr. Durno, the respondents, turned out, had obtained absolute and irredeemable conveyances to all his heritable property. The appellant, a trustee, brought the present action of reduction to set aside these conveyances, as granted without any just or true value but in mere relief and security for future debts, and the same were null and void, in terms of the act 1696, c. 5.

It was admitted by the appellant, that these dispositions sought to be reduced, were *ex facie* absolute and irredeemable dispositions to the property. Upon them infestment had followed; and these infestments were recorded. On the other hand, it was admitted by the respondents, that they had never paid any price or value for the conveyances, —that, though conceived in the form of absolute conveyances, yet they were granted to them in relief and security of Mr. Durno's future intromissions, for which they had become liable in terms of their cautionary obligations, and that they had never entered into possession of the subjects, but that Mr. Durno had continued to possess these as formerly. These facts being conceded on both sides: It was argued for the appellant, That as Mr. Durno's receipts of the public money were all, or most of them, subsequent to the sasines in favour of the respondents, and as the amount

of these was uncertain, the sums varying from day to day, according as he received or accounted for the public money, the situation of the respondents was exactly similar to that of cautioners in a cash account with a bank; and, in the case of Brough v. Selby, it was found that an heritable security, granted to such a cautioner, was good only as to the money advanced prior to the infestment. Agreeable to this decision, and many others decided in the same way, he contended that the dispositions, as securities, ought to be restricted to the sums advanced prior to the date of the sasines. For the respondents, it was argued that the statute 1696 could not apply to the circumstances of this case. It did not apply to dispositions *ex facie* absolute and irredeemable, but only to those which *ex facie* of the deed itself showed they were merely in security for future debts. In the case of Selby, the deed which the Court set aside, was a disposition which bore *in gramio* to have been granted to Selby, to secure him from the consequences of his cautionary obligation. But, in this case, the deed sought to be reduced was an absolute and irredeemable disposition to the property, which does not fall under the act of Parliament. The words of that act, which has reference to this transaction and question, are, "And because infestments for relief, not only of debts already contracted for thereafter, are often found to be the occasion or covert of frauds, it is therefore further declared, that any disposition or other right that shall be granted for hereafter, for relief or security of debts to be contracted for the future, shall be of no force as to any such debts that shall be found to be contracted after the seisine or infestments following on the said disposition or right, but prejudice to the said disposition and right, as to other points, as accords." Dispositions in security are alone here referred to. And the act cannot be construed to apply to absolute conveyances. When frauds appear, the common law affords a remedy, but, in matters of statutory provision, the enacting clause must be taken as it stands, and cannot be extended beyond it.

The Lord Ordinary repelled the reasons of reduction. June 24, 1801.
And, on several representations, he adhered. July 10, —
On reclaiming petition to the Court the Lords adhered. Jan. 29, 1802.
Against these interlocutors the present appeal was Feb. 16, —
brought to the House of Lords. Mar. 3, —
May 15, —
June 24, —

Pleaded for the Appellant.—The deeds sought to be reduced, though conceived in the form of absolute and irre-

1807.

FORDYCE

v.

GORDON, &c.

Mar. 2, 1791.

Fac. Coll. vol.

x. p. 351, et

Mor. 1159.

1807. deemable dispositions or conveyances, were in fact dispositions in security of future debts. And although this does not appear on the face of the deeds or record yet, as it is judicially admitted by the respondents, the admission ought in law to be equivalent to a declaration made to the same effect in a back bond. Besides, this view is both consistent with the spirit of the act 1696, and the views of the legislature in regard to it, and ought to be given full effect to.

FORDYCE
v.
GORDON, &c.

Pleaded for the Respondents.—The act of Parliament 1696 had for its object a particular species of obligations and securities, common in those days, which, from their uncertainty, both as to extent and nature, defeated the important institution of the public registers, and led besides to many acts of fraud. To this object the statute was confined; and the means might properly correspond with the end, the prohibition is singly directed against dispositions in security of debts which are undeclared and unknown. While the dispositions now objected to by the appellant, so far from being indefinite, are absolute and complete transmissions of the full right of property, changing entirely the person of the holder, and by public registration notifying that change to the world. To hold that such deeds were within the enactment of the statute, were to extend the statute beyond what the legislature intended. This view of the statute is conformable to the opinion generally expressed in courts of law in regard to this statute. And the point has therefore been set at rest, ever since the case of Riddle and Nibble. The judicial admission of the respondents in regard to the deed to the effect that though appearing *ex facie* absolute, yet in reality they were securities for future debt, cannot affect these deeds, or the rights of parties under them, nor entitle the appellant to plead the benefit of the statute.

Feb. 16, 1782.
Mor. 1154.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £100 costs.

For Appellant, *W. Alexander, Adam Gillies.*

For Respondents, *Wm. Adam, James Gordon.*

NOTE.—Unreported in the Court of Session.

[Fac. Coll. Vol. xiv. p. 414.]

1807.

The EARL OF GALLOWAY,	- - -	<i>Appellant ;</i>	THE EARL OF GALLOWAY v. M'HUTCHON, &c.
ALEXANDER M'HUTCHON, CHARLES SELKRIG,	}	<i>Respondents.</i>	
and Others,			

House of Lords, 21st April 1807.

LANDLORD AND TENANT—LEASE—SECLUDING ASSIGNEES AND SUB-TENANTS—IRRITANCY AND REMOVING.—A lease was granted to the tenant and his heirs, secluding assignees and subtenants, for 21 years. The tenant died two years thereafter, in considerable debt ; and the question was, Whether certain transactions gone into with the heir, by which the latter entered into possession *cum beneficio inventarii*, giving the creditors the benefit thereof, was not a covered assignation, and the tenant had thereby incurred an irritancy of the lease ? The heir, pending the action, entered into an agreement with the creditors, whereby the latter discharged their claims, and transferred the stock for a certain sum ; Held that there was no ground for removal, and the defenders assolizied. Affirmed in the House of Lords.

The respondent's brother, the deceased Hugh M'Hutchon of Chanque, held a lease from the appellant of the four farms of Bargrennan, Falbains, Glengrubbock, and Drumla-whanty. In 1796, when this lease was granted, two of these farms were held under previous leases, which did not expire until 1803 and 1807 respectively ; but, on condition of his renouncing these leases, and granting an immediate increase of rent, the lease in question was granted, in the following terms : " In assedation let to the said Hugh M'Hutchon, Dec. 24, 1796. " *his heirs and successors*, secluding assignees and subten- " ants, legal and conventional, in whole or in part, all and " whole the said lands of Bargrennan, Falbains, and Glen- " grubbock ; and all and whole the said lands of Drumla- " whanty, with the houses and haill pertinents thereto be- " longing, or presently occupied by himself, lying in the " parish of Menigaff, and stewartry of Kirkcudbright, and " that for the space of twenty-one years from and after the " term of Whitsunday last ; and, after the expiry of the " said twenty-one years, during all the days and years of " the said Hugh M'Hutchon's natural life." The rent fixed was £210 per annum. They were improving leases, and it appeared necessary, in order to make the lands yield anything like an adequate return, in order to pay this rent, to undertake laborious and expensive improvements. With

1807. this view, therefore, the tenant proceeded forthwith to lay out heavy expense, both in liming the lands and in building fences, and in making roads. But, while these operations were going on, the tenant died. On this event, it was found that the deceased had left a great number of creditors, and a considerable amount of debt, for payment of which there were no means but his small heritable estate of Chanque and the stocking upon these various farms, which were quite insufficient to pay his creditors. There were obstacles in the way of the creditors proceeding against the deceased's estate, to avoid which, and all unnecessary expense, the creditors applied to the respondent, the deceased's brother, and heir at law and executor, that he might serve as heir, and confirm also as executor, for the purpose, 1st, Of selling the estate of Chanque; and, 2d, For disposing of the crop and stocking upon his farms. The respondent at the time being in delicate health, was unwilling, and declined interfering, although he was himself a creditor to a large amount. At the first meeting of the creditors, however, it was pressed on him as a measure which might ultimately prove beneficial to himself. At last he agreed, as the minutes bore chiefly induced by the solicitations of the creditors, and expressly upon condition that, in allowing his name to be used, he was not to incur any passive title. Liberty was also expressly given for him to retract from this compact in case it turned out that his health would suffer. At this meeting of the creditors, three of the creditors farmers were appointed as a committee to co-operate with and give their advice and counsel to the respondent Alexander M'Hutchon, in the management of the deceased's affairs. But Alexander M'Hutchon's health having at this time grown worse, he wrote the agent of the creditors that he found himself unable to undertake the management of his brother's affairs, and therefore resiled from the engagement.

THE EARL OF
GALLOWAY
v.
M'HUTCHON,
&c.
Oct. 26, 1798.

A second meeting of the creditors took place, whereupon it was resolved by the creditors to apply to Mr. M'Hutchon to allow his name to be used, on their guaranteeing to keep him free of all responsibility. This was consented to, upon his receiving a bond of indemnity freeing him of all trouble except the signing of the necessary papers.

Under this arrangement, the property of Chanque, and the moveables, were easily disposed of; but there seemed to be more difficulty about the farms, owing to the leases se-

cluding assignees and subtenants; and it became desirable for the creditors to derive benefit from them, as, in the meantime, they had materially increased in value. The respondent Alexander M'Hutchon, as heir of his deceased brother, was entitled to take the lease, but he could not assign it without the consent of the landlord. Having it in view either to negotiate some arrangement with the landlord, so as to be able to assign or subset the leases, he, in the meantime, saw it was necessary, until that was effected, to crop the farms; and having made his intentions known to the creditors, with the view of obtaining their concurrence, this was granted, and certain persons were {named at a meeting of these creditors, and appointed as managers, with Alexander M'Hutchon's concurrence, in "regard to the "management and disposal of the current tacks." Alexander M'Hutchon entering *cum beneficio inventarii*, and giving over the profits of the farm to the creditors.

Having gone thus far, the appellant raised his action of removing, under the act of sederunt, before the sheriff. The sheriff assoilzied the defenders (respondents), whereupon an advocation was brought, to which was added a declarator; and both actions having been conjoined, the appellant pleading, 1st, That the transactions gone into amounted to an assignation of the lease on the part of the respondent Alexander M'Hutchon. 2d, That the respondent had no control over the committee appointed as managers, whom he suffered to remain in the natural possession of the land. 3d, That they had subset and assigned the farms from year to year, and were neglecting the interests of the farm, and contravening the stipulations of the tack. 4th, If it was competent for a person entered heir *cum beneficio inventarii* to appoint managers with instructions to account to the creditors of a deceased tenant, the clause secluding assignees and subtenants would be defeated. In answer, the respondent contended that the managers were no more than stewards or servants answerable to him. The last appointed managers were appointed by himself, the managers appointed by the creditors having ceased to act. These managers were therefore no way connected with the creditors, nor accountable to them, but accountable to the respondent, whom the creditors had discharged. A proof was allowed to both parties, in which it was clearly proved that the farm was managed by certain creditors, but that no assignation had been granted.

1807.

THE EARL OF
GALLOWAY
v.
M'HUTCHON,
&c.

Durham v.
Henderson &
Livingston,
Jan. 23, 1773.
Mor. 15283,
Vide Note at
the end of the
case of Dal-
housie v. Wil-
son, Dec. 1,
1802, F. C.

1807. Pending the action, an agreement was entered into by the respondent Alexander M'Hutchon, on the one part, and Charles Selkrig and others, acting for the creditors, whereby, for a certain sum, they discharged all claims against him as representing his brother, and sold to him the stocking.

THE EARL OF
GALLOWAY
v.
M'HUTCHON,
&c.

Jan. 19, 1803. The cause was reported to the Court; and, on advising memorials, the following interlocutor was pronounced:—
 “ The Lords having the mutual memorials for the parties,
 “ with the proof adduced, and further proceedings, they, in
 “ the advocacy, advocate the cause, and conjoin the same
 “ with the process of declarator, sustain the defences, and
 “ assoilzie the defenders from the conclusions of both ac-
 “ tions, find the pursuer liable in the full expense of extract,
 June 7, 1803. “ but find no other expenses due.”* On reclaiming peti-

* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said :—“ Both parties seem here to have been in a mistake, in supposing that the defender could not succeed to this farm, as heir to his brother in the lease, without incurring a passive title, unless he entered *cum beneficio inventarii*, which, it is supposed, made him a trustee for the creditors ; 1st. The heir in a lease, which excludes assignees and subtenants, takes a right which no other person can enjoy. It is a sort of tailzied fee, which creditors cannot touch ; and the heir taking it after the death of the original tacksman, does not represent him, but takes it *suo jure*, as conditional institute by the joint will of the original tacksman and the landlord. It is one of the conditions of the transaction, that it shall not be a subject of representation, but that the person who is heir designative, shall take, as eventual tacksman, or at least as an heir under a strict entail, and of course be liable to the landlord in all the prestations of the tack, and run the sole risk of profit or loss, as he is not accountable to any other person. So it was considered by the Court in the case of *Ogilvy v. Arnot*, 18th May 1796, and 1st March 1799. The defender, therefore, might, with perfect safety, have taken up this tack upon his brother's death, without any service *cum beneficio*, or any transaction with creditors ; and it was imprudent in him to introduce their trustees into the possession, which has given a colour to the action now raised against him. In all events, he was an heir of provision in the strictest sense, and not liable *ultra valorem*.

Unreported.

“ 2d. It appears, however, that as he did this, either from ignorance, or from a laudable desire to see his brother's debts paid, the only consequence which could follow in law was, that the landlord had a right to insist that these trustees, as virtual assignees, should

tion, which sought, at all events, for a decree of removing against Selkrig, trustee for the creditors, the Court found, "In respect Charles Selkrig, the trustee for the creditors of "M'Hutchon, does not claim possession of the farms in "question, it is unnecessary to pronounce any decree of re- "moving against him, and *quoad ultra* adheres to their "former interlocutor, and refuse the desire of the petition."

1807.

THE EARL OF
GALLOWAY
v.
M'HUTCHON,
&c.

Against these interlocutors the present appeal was brought by the landlord to the House of Lords.

Pleaded for the Appellant.—In the present case, the lease to the deceased Hugh M'Hutchon and his heirs, expressly excluding assignees and subtenants, legal or conventional, in whole or in part, meant nothing more nor less than an exclusion of either creditors of the lessee adjudging or attaching his right by legal process, or persons acquiring by purchase or voluntary transmissions; and, accordingly, the

be removed, and that the defender himself should take the possession and management, as the only person entitled to do so. The lease contains no clause of forfeiture, nor can any take place.

"3d. The defender is now in full possession, in consequence of the transaction by which the creditors have given up any claim, which, although unnecessary, was perfectly legal and fair. The entry *cum beneficio inventarii* was a superfluous step, and can make no difference upon the question. Could the creditors have forced him not to remove?"

LORD BANNATYNE.—"I think the possession by managers was in defrad of the lease."

LORD MEADOWBANK.—"The lease is descendible to heirs, and M'Hutchon cannot be removed. He may apply the profits as he pleases. The heir is liable *in valorem*."

LORD HERMAND.—"He is not like an heir of entail, who does not represent his predecessor, but only the tailzier. The entry *cum beneficio inventarii* was proper, in order to save him from the risk of passive title. I am clear that he could not take this tack without being liable to creditors. This he very soon declared, and that he would not possess, and that the creditors must keep him free of all claims."

LORD CRAIG.—"There is here no assignation, and the possession is for the tenant, *i. e.* the deceased tenant, for whose debts we must suppose the present tenant liable, to the extent of the profits of the farm, *ergo*, the management must be under him."

LORD BALMUTO.—"M'Hutchon is the tenant to all intents and purposes. He cannot give it up without Lord Galloway's consent. He is liable to all the prestations of the lease."

Lord President Campbell's Session Papers, vol. 110.

1807.

THE EARL OF
GALLOWAY
v.
M'HUTCHON,
&c.

creditors of Hugh M'Hutchon never thought of adjudging this lease, nor did they think of taking, or the responder Alexander, the heir, of granting an assignment. All concerned were sensible it would be vain to follow such courses but the trustees for Hugh M'Hutchon's creditors were let into the possession, under the colour of its being the possession of the heir, or, more properly, they assumed the possession without even that colour, as they had no special authority from the heir, and can hardly be said to have had his connivance. The only question then, while matters were in that state, was, Whether the bargain which the appellant made with the lessee could be defeated in that way by such a device, a question which surely needs little discussion. It was agreed that the farm should be possessed by Hugh M'Hutchon and his heirs, *but not by their assignees or subtenants*, that is, none but he or his heirs should possess; and yet here were stranger tenants, and of the worst species introduced, being a set of creditors, or trustees for creditors and their subtenants, who had no individual interest to manage the farm properly, but whose whole object was to draw as much money from it as possible, though every word of the lease shows that it was granted with a view, and with the expectation of the farm being improved. Nor is it an answer to say, that by the lease the tenant was under no obligation to reside upon the farm—in the nature of things he could not reside on all the four farms,—and that the exclusion of assignees and subtenants was therefore not repugnant to the lessee occupying the farm by servants, or persons managing for him; but this doctrine the appellant has no occasion to dispute, when the facts of this case are attended to. The fact is, that Alexander M'Hutchon is not in possession. The managers, who are said to be in possession for him, are not so,—they are in possession for the creditors, for whose behoof they act, and to whom the profits or rents of the farm are paid. 2d. The question then is, Whether the agreement entered into, pending this cause, and at the last stage of it, ought to make any difference? It can make none, because it is obviously just another device fallen upon, when it was seen the former devices would not do. The agreement states what is false, that Alexander did enter into possession of the farm as heir; while, on the other hand, in other parts, it acknowledges that this possession was for behoof of his brother's creditors. It purports to give him actual possession, and draws that back to

Martinmas 1802, though it is undeniable that he was not, and could not be in possession, at least, until after the last date of his contract, 8th of January 1803. That contract also shows that nothing on the farm was his, not so much as the instruments of husbandry, far less the stocking, until the date of that contract. Supposing, therefore, that the actual possession of the stocking of the farm was delivered over to Alexander M'Hutchon after the date of the contract, which was the 8th of January 1803, and before the Court gave judgment, which was upon the 18th of the same month; in what character did he then possess? It was not surely as heir of Hugh M'Hutchon, but under the sufferance of Hugh's creditors. And the whole transaction is the same as if he had assigned to Hugh's creditors, and Hugh's creditors had assigned back to him.

1807.

THE EARL OF
GALLOWAY
v.
M'HUTCHON,
&c.

Pleaded for the Respondents.—1st. Neither the assignment, nor any such transaction as that alluded to, ever existed. 2d. If there had been an assignment of the lease, or any transaction equivalent thereto, although it might have furnished ground for an action of damages, it would not have been relevant to infer the appellant's conclusion of irritancy and removing against the respondent. 3d. Even if the transaction libelled had been proved, and had been relevant to infer an irritancy against the respondent, it must have been competent for the respondent to purge it at any time before final judgment; and he must be held to have purged it, by obtaining a discharge from the creditors, which is dated 27th and 29th December 1802, and 5th and 8th January 1803.

After hearing counsel, it was
Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellant, *Wm. Adam, Charles Hay.*

For the Respondents, *John Clerk, Wm. Alexander, David Cathcart.*

NOTE.—One of the cases founded on by the appellant, *Durham v. Henderson and Livingstone*, 23d January 1773, *Mor. Dict.* 15,283, it was observed on the bench, had been prematurely and erroneously collected, as that judgment had been altered by a subsequent interlocutor of the 18th January 1775; and the final judgment of the 8th March same year, refused a reclaiming petition, complaining against that alteration.

1807.

THOMSON, &c.
v.
TATE, &c.

DAVID THOMSON, W.S., and MARGARET THOMSON and JEAN THOMSON, the Children and Representatives of ALEXANDER THOMSON, Esq. late Deputy-Cashier of the Excise in Scotland, deceased, - - -

ALEXANDER KINCAID TATE, Writer in Edinburgh, Trustee appointed by Mrs. JEAN LIVINGSTONE or ALISON, relict of ALEXANDER ALISON, Esq., Deputy-Cashier of Excise, ELIZABETH HOOD and Others,

Appellants

Respondents

House of Lords, 11th July 1807.

REDUCTION OF DEEDS—INSANITY—RELEVANCY—INTEREST TO

—1. A reduction of deeds was brought, on the ground of insanity. The granter of the deeds had been insane in 1795, and the deeds challenged were executed in 1798; but there was no specific allegation that the granter, at the dates of these deeds, was insane. Held the facts irrelevant, and too vague to go to proof. 2. There was a previous deed, which excluded the pursuer, but which was not challenged. Held him also to have no title, in respect of the deed, to insist in the present action.

This was a reduction of certain deeds, on the ground of incapacity, in the following circumstances.

Mr. Alison, deputy-cashier of Excise, on 7th March 1787, executed a trust-deed, giving to his wife, Mrs. Alison, the liferent of his whole property, with right to dispose of the sum of £500 of the capital at her death; the residue at her death, going to the late Alexander Thomson, and even succeeding also to the £500, if not expressly otherwise conveyed by his wife. The deed contained a clause, reserving power to Mr. Alison to alter the destination of the property at pleasure.

On the 28th August 1787, he executed a deed relative to the trust-deed, in which he required his trustees, of which Alexander Thomson was one, to convey "to Mrs. Jean Livingstone, my well beloved spouse, if she shall happen to survive me, and be alive at the end of twelve calendar months after my decease; at which period I compute that my subjects may be liquidated, to whom, in that event, and to her disponent, expressly secluding her heirs and assigns."

“executors, I do hereby dispone, assign, and make over,
 “the said free residue of my subjects, debts, means and
 “effects, heritable and moveable, to be disposed of at her
 “pleasure, absolutely and without restriction, recommend-
 “ing to her, however, in the disposal thereof, either in her
 “own lifetime or at her decease, that as my affection for
 “her hath induced me to give her all my property, to the
 “prejudice of my own relations, she have these, my nearest
 “relations, in grateful remembrance in the disposal of what
 “shall devolve to her by virtue hereof; and, in case the said
 “Mrs. Jean Livingstone do not survive me, and be alive at the
 “end of twelve calendar months after my decease, or shall
 “fail to make any special disposition or conveyance in writ-
 “ing as hereunto relative of what shall devolve to, and be
 “vested in her by this deed; in either of these events, I
 “do hereby declare, that, after the purposes aforesaid are
 “fulfilled, then the whole free produce and residue of my
 “subjects, means, and effects, heritable and moveable, shall
 “belong to the said Alexander Thomson, my clerk and as-
 “sistant, his heirs, executors, and assignees whomsoever; to
 “whom I do hereby, in the above events, dispone and con-
 “vey the same.”

1807.

THOMSON, &c.
 v.
 TATE, &c.

Mr. Thomson, the person intended to be ultimately fa-
 voured, was married to Mr. Alison's niece, and Mr. Thomson's
 family were the heirs at law of a Mr. Young, who was the
 heir at law of Mrs. Alison.

On the 16th of January 1792, Mr. Alison executed another
 deed, by which he returned to his first intention, of bestow-
 ing on his wife the power only of disposing of £500, and
 the residue to belong to Mr. Thomson. In this deed he
 expressly revokes “the deed 28th of August 1787,” and de-
 clared it “null and void.”

1792.

But, on the 10th of November 1793, he appended to the
 above deed, a revocation of it, also in these terms:—“Upon
 “reconsidering the state of my affairs, which have lately
 “altered, I have thought it proper to alter and make void
 “this deed, and declare that my supplementary disposition
 “and settlement, dated 28th August 1787, still remaining
 “in my custody, shall be effectual and subsisting, if the
 “same is not altered by me afterwards.”

1793.

“On 29th November 1793, he executed another deed,
 by which he bequeathed, “on account of faithful services
 “and affinity, £1000 to Mr. Thomson,” adding, that this

1793.

1807. was "besides the hope of succession," which sum was declared payable six months after his death.
- THOMSON, & Co. v. TATE, & Co. 1794. Mr. Alison died on 16th July 1794. On 29th October 1794, about four months after her husband's death, Mrs. Alison executed a testamentary deed, conveying to certain executors, her effects in general, without any mention of Mr. Thomson.
1795. In the following year she became insane, and remained under strict keeping for some time. The appellants allege that she never completely recovered her intellects; but
1798. stated, that in the year 1798, she could not have been pronounced to be entirely insane. On 22nd June of that year she executed a trust deed, conveying to the respondent, in trust for the other respondents, her whole property, deducting several legacies, one of which was to Mr. Thomson of £750. This deed was ratified by another on 22d December; and, on 10th December 1799, she executed another deed, revoking her legacy of £750 to Mr. Thomson.
1798. It was of these three last deeds, executed by Mrs. Alison that the present reduction was brought, first by Mr. Thomson, and afterwards continued by the appellants, in order to have them set aside, on the following grounds:—1. That Mrs. Alison had been, and was entirely insane in the year 1795. 2. That she never afterwards recovered the vigour of her mind which she may have possessed before her insanity, and that, at the dates of the deeds in question, and for some time prior and posterior thereto, although *not insane*, her mind was in a state of great imbecility. 3. That, in her weak state of mind, she was practised on and importuned by the respondents, Mr. Tate and Miss Hood before mentioned, in order to prevail on her to make a will in favour of themselves, and to deprive Mr. Thomson of his rights. 4. That her eyesight, at the dates of these deeds, was so bad as to be entirely incapable of reading these deeds. 5. That she had always expressed an intention of bequeathing her property differently. 6. That the deeds were not read over to her at the time she is said to have subscribed them, some of the testamentary witnesses not seeing her exhibit her subscription or hear her acknowledge it. 7. That Mrs. Alison had never given instructions to any one to frame the deeds under reduction, and that she never actually knew or understood the import of the deeds said to contain her last will.

In a condescendence, these facts were embodied, and 1807.
offered to be proved by parole evidence.

The answer made to these was, that the facts condescended THOMSON, &c.
v.
TATE, &c.
on, in regard to insanity and imbecility, were altogether irrelevant to infer the conclusions drawn from them; besides, that the appellants had no interest to insist in the action, being excluded by the prior deed 1794, which stood unchallenged.

Replies and duplies followed these answers, whereupon July 12, 1802. the Lord Ordinary pronounced this interlocutor:—"Having considered the foregoing condescendence, pursuers' replies and duplies, productions, and whole process. With regard to the first article in the condescendence, Finds, that it is not alleged that the late Mrs. Alison was in a state of insanity, when any of the deeds under challenge were executed. As to the second article, finds, That though it is said Mrs. Alison never afterwards recovered the vigour of her mind which she possessed before insanity, yet it is not alleged that she was in a state of incapacity when these deeds were granted; (on the contrary, the This part deleted in the House of Lords.
pursuer himself has shown, that in his opinion, she was not incapable, by having transacted business with, and taken receipts from her). With respect to the seventh article, where it is said, that Mrs. Alison never actually knew or understood the import of the deeds under reduction, finds, That this is too vaguely stated, and the mode of evidence not sufficiently pointed out, so as to obtain a proof thereof; finds, That the other articles in the condescendence are not relevant; therefore, and in respect of the prior deed, executed by Mrs. Alison on the 29th October 1794, of which no challenge is brought, and which excludes the pursuers' title to insist in the present action, assoilzies the defenders from the whole conclusions thereof, and decerns."

On representation, suggesting that the Lord Ordinary might take the case to report, in case his Lordship continued of opinion that no proof ought to be allowed. The Lord Ordinary took the case to report. Informations were ordered and lodged; and, of this date, the following inter-
Jan. 12, 1803.
locutor was pronounced:—"On report of Lord Craig, and having advised the informations, the Lords repel the reasons of reduction, assoilzie the defender, and decern; but find expenses due to neither party." On reclaiming petition and answers the Lords adhered. June 7, —

1807. Against these interlocutors the present appeal was brought by the pursuer to the House of Lords.

THOMSON, &c. *Pleaded for the Appellants.*—Mr. Alison's deed of 28th August 1787 was revoked, and declared null and void, and not afterwards revived in a legal manner, so that Mrs. Alison (even if her mind had been entire), had it not in her power to dispose of her husband's property to any further extent than what was allowed by the prior deed, viz. £500. 2. The will made by Mrs. Alison, dated 29th October 1794, a few months after her husband's death, did not mention or refer to her husband's settlements, and neither was intended to comprehend, nor could comprehend, the property conveyed by these settlements to her, under the positive condition, that if that property should not be specially conveyed by her by a deed referring to them, it should belong to the appellants; consequently, the appellants are not precluded by that will from challenging what are alleged to have been Mrs. Alison's subsequent deeds. 3. Mrs. Alison not only gave no instructions to make out the deeds under challenge, but was incapable of doing so, on account of great weakness of mind and want of memory. 4. The deeds were not duly executed, not having been read over to her when signed, she being incapable of reading them herself from defect of eyesight, and the witnesses having been ignorant of her person. 5. At the date of the last deed she had relapsed into a state of absolute insanity. 6. The respondent and Miss Hood misrepresented to Mrs. Alison Mr. Thomson's conduct towards her, and, by importunity and deceit, prevailed on her to subscribe the deeds, the effect of which, if sustained, would be to disappoint Mr. Alison's heirs at law of the succession. 8. Evidence of all these particulars having been offered, the Court of Session ought, at any rate, before answer, to have allowed a proof of the facts stated in the late Mr. Thomson's condescendence and reclaiming petition.

Pleaded for the Respondents.—The disposition and deed of settlement executed by Mrs. Alison on 29th Oct. 1794, completely excludes the appellants' title to insist in the present action. That deed was executed when, according to the appellants' own statement, the vigour of Mrs. Alison's mind was yet entire, and, in fact, full ten months before the first attack of the malady which the appellants found on; and, accordingly, to this hour the appellants have never instituted any legal challenge of that deed. By the terms of

that settlement, Mrs. Alison vests her whole estate in trustees, for behoof of her nephew, Mr. Adam Callender, and Miss Hood; thus demonstrating her will and determination in favour of the very persons to whom she again gives the principal interest in her funds by the deeds under challenge. Hence it is plain, that although these last deeds were to be reduced and set aside *in toto*, the appellants would have neither right, title, nor interest in Mrs. Alison's estate, because, in that event, every fraction of her funds would go to Mr. Callender and Miss Hood, in terms of this prior settlement. Now the respondents apprehend, that no rule of law is more firmly established than this, that, when the interest of a pursuer is cut off by a deed not brought under challenge, and which stands unconnected with those to which the reduction applies, it puts an end to his right to insist. 2d. Mrs. Alison being the absolute and unlimited proprietor of the estate left her by her husband, she was entitled to dispose thereof in any way she thought fit; and she has accordingly done so in an unexceptionable manner, by the deeds under challenge. And Mrs. Alison was not rendered incapacitated from executing these deeds on the ground of insanity, for although she was afflicted with that malady some years before the dates of these deeds, it does not follow that she was so incapacitated at the time these were executed. This, in law, it is necessary to establish and prove. Here the pursuer has not ventured even to aver this, which, in order to found a relevant ground in law to set aside these deeds, on the head of insanity, was absolutely necessary. But the fact was, the late Alexander Thomson, the pursuer in the cause, could not, in conscience, aver what was so contrary to the fact, for, from the deceased Mrs. Alison's transactions with him in business in the years 1797, 1798, 1799, as one of the trustees of her deceased husband, it appeared that she had been consulted, as appeared from the trustees' sederunt-book and other writs in process, about the trust affairs, in any matter of importance, and that these trustees had continued to take, and she to grant and sign receipts and discharges in reference to payments received by her, and other matters regarding the trust. So that he has not been able, and, in point of law, has not stated any relevant averment of insanity at the times these deeds were executed. 3. As to the plea, that the deeds were not read over to her at the time they were executed, and that the witnesses did not know her, nor the contents of the deed

1807.

THOMSON, &c.

TATE, &c.

1807. *WILSON, &c.* v. *ALEXANDER, &c.*
 they subscribed, in point of law, neither of all these were necessary in the present case. It is not necessary that the witnesses know, either the granter, or the contents of the deed. All that is necessary is, that they are informed of who it is that is to sign, and that *that* person is seen to subscribe the deed, or heard to acknowledge her subscription.

After hearing counsel, it was

Ordered and adjudged that the interlocutor of the Lord Ordinary of the 12th Jan. 1802 complained of be varied, by leaving out after (granted) to (with), and after (are) by inserting (either), and after (relevant) by inserting (or too vaguely stated), in page 5, and that with these variations, the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Wm. Alexander, W. Maxwell Morrison.*
 For the Respondents, *Henry Erskine, Wm. Adam, Thomas W. Baird, Andrew Cassels.*

NOTE.—Unreported in the Court of Session.

JOHN PETTIGREW WILSON, Principal Tack-	} <i>Appellants;</i>
man of the Lands and Coal at Green, near	
Glasgow; JANET, GRIZEL, ELIZABETH,	
MARY, AGNES, and MARGARET PETTI-	
GREWS, Joint Proprietors of the said lands;	
and WALTER WILSON, Merchant in Glas-	} <i>Respondents.</i>
gow, Husband of the said MARGARET for	
his interest,	
JOHN ALEXANDER, Merchant in Glasgow;	
JAMES HOPKIRK of Dalbeth, Merchant	
there; and THOMAS EDINGTON, of Clyde	}
Iron Works, - - - - -	

House of Lords, 12th August 1807.

DAMAGES—RELEVANCY—BANKRUPTCY — LIABILITY OF TRUSTEES AND COMMISSIONERS FOR DAMAGES.—The trustee and commissioners on a bankrupt company estate, the chief assets of which consisted of a valuable lease of coal, entered into the possession of the lease, and wrought the coal for behoof of the creditors. In doing this, they wrought the coal in such a manner as to do great damage to the value of the coal and surface above. In an action of damages against them, they stated that the action was irrele-

vant against a trustee and commissioners, appointed by act of Parliament to manage the bankrupt estate to the best of their judgment. Held the action not relevant. In the House of Lords case remitted, with strong doubts expressed as to the correctness of the judgment.

1807.

WILSON, &c.
v.
ALEXANDER,
&c.

The appellants, Janet and Grizel Pettigrew, had right to the lands of Green, as adjudging creditors of John Pettigrew of Green, their brother; and afterwards they, along with the other appellants, succeeded to those lands as heirs portioners. On 14th July 1790, while they held these lands as adjudging creditors, Janet and Grizel granted a lease to "John Pettigrew Wilson, their nephew, (then only 13 years of age), and to his father, Walter Wilson, as curator for him, *but for his use and behoof solely*," for the space of 21 years, they being bound, in working the coal, "to leave a proper number of stoops or pillars for the support of the roof of said coal hereafter," &c.

Walter Wilson, the father, had no means of his own. He had no knowledge of the practical working of coal; and, by the lease, he had no pecuniary interest bestowed, and was only tutor for his son. He, however, in order to carry on the working of this coal, took into partnership one John Shiels, coalmaster in Camlachie, to whom he assigned (with the appellant, John Pettigrew Wilson's concurrence, then aged 14,) one half of the whole concern; and the business was conducted under the firm of Walter Wilson and Co., under which they commenced operations, and completed two pits. But neither of these having adequate funds, they had recourse, first, to loans from Misses Janet and Grizel Pettigrews; and, subsequently, with the same view, had to assume as partners Messrs. James Milligan and James Burnside, merchants in Glasgow; and then the firm was carried on under the title of the Green Coal Work Company. Within a year thereafter, Mr Burnside assigned his share to Mr. Milligan; and soon thereafter Mr. Milligan became bankrupt, and John Alexander was appointed his trustee, who raised action against the Green Coal Company for £1268, as the amount of certain sums alleged to be due by the Company to Milligan and Burnside, and obtained decree therefor in absence.

Under these circumstances, and the system of management adopted, the concern became ruinous to all; and, at last, Walter Wilson was advised to apply for sequestration, with concurrence of John Alexander, a creditor to the extent required by law. John Pettigrew Wilson was then un-

1807. **WILSON, &c.**
 v.
ALEXANDER,
 &c.

der age, and was on this occasion induced to subscribe a mandate, authorizing this application, and a sequestration was accordingly awarded, on which John Alexander was appointed trustee, and James Hopkirk and Thomas Edington appointed commissioners.

In assuming the management of the estate, they resolved, with the consent of the creditors, to carry on and work the lease of the coal, which lease was the only estate belonging to the bankrupts.

Soon after entering on the management of the working the coal, it appeared to the appellant, John Pettigrew Wilson, the lessee, and also to the Misses Pettigrew, that they were doing so in a manner ruinous to the value of the coal and to their property. They therefore interfered; the latter advanced and paid off many of the debts of the creditors, and offered good security by bond, to pay the remaining claims ranked on the estate, while John Pettigrew Wilson, in these circumstances, applied for a recall of the sequestration. A long litigation ensued, this application being vigorously opposed by the trustee and commissioners, but terminated ultimately against them, the Court being satisfied that the caution offered was sufficient, and the sequestration was recalled accordingly.

The presentation of damages was brought at the appellants' instance against the respondents, after a notarial protest, intimating the claim, which set forth, that ever since the trustee and commissioners had commenced the management and working of the coal, they had neglected, in making the excavations or rooms, to make proper pillars or stoops of sufficient strength and thickness in the pits to support the roof, by means of which, not only great damage and injury had been done on the surface to the mansion house, offices, &c., but also below, by the loss of the most valuable seam of coal, from the falling down of the roof, and consequent influx of water. In defence, it was denied, in point of fact, that they had not managed the working of the coal properly. They further averred, that, as trustee and commissioners for the creditors, they relied on their men of skill doing what was necessary for the safe and profitable working of the coal, for behoof of the creditors. Objection was also taken to the relevancy of the summons, that there was no relevant ground in law to subject the trustee and commissioners in damages.

The Lord Ordinary, before answer, ordered a condescendence of the facts offered to be proved. In this condescendence the appellants stated, that, before the respondents en-

tered on the management of the works, the working of the coal had been conducted in a regular manner. In particular, in this pit, the rooms or excavations, prior to the sequestration, had in general been limited to four yards in breadth or wideness, and the stoops or pillars, left for supporting the coal roof, were about five yards square. After the operations of the respondents had gone on for some time, this mode of working was reversed. The rooms, in place of being made four yards, were made five yards at the very least in wideness; while the stoops or pillars left, which ought to have been increased of course beyond five yards square as formerly, were now reduced to be from two to four yards square; nay, some of them were made only four feet, and others three feet, or one yard, in breadth or thickness. So much was this system carried on, that the colliers began to be apprehensive, from the cracking of the pillars, of their safety, by the falling of the roof, so much so, that they, on 8th March 1797, removed the horses and part of the machinery. And, next day, a total fall of the roof occurred, by all which the loss of a valuable seam of coal was sustained —also by influx of water, damage to the works otherwise, and also damage to dwelling houses and offices at Green above had occurred; and, finally, that these had been all occasioned by the defenders, or James Faulds, who managed under their directions and authority. In answer to this condescendence, the trustee stated a separate defence, namely, that a trustee for creditors under a sequestration was not personally liable to make good the obligations he had entered into, *qua* trustee, nor even responsible for damage done by any person acting for behoof of the creditors. The commissioners had also separate defences, stating that, by virtue of their office as commissioners, they had no control over the trustee in this matter by the statute, and therefore not liable. The Lord Ordinary, before deciding on the relevancy of these facts, ordered a proof *prout de jure*. A representation from the respondents being refused, they reclaimed to the Court, maintaining, that as their objections to the relevancy resolves into a general question of law, any parole evidence offered cannot throw light on the question. They insisted that, as trustee and commissioners acting for a general body of creditors, under the authority of the bankrupt act, they could not be made responsible for doing that for which, on all hands, they had authority for doing. Besides, mismanagement against them is not to be presumed, for they are appointed to act for the benefit and profit of all. At the

1807.

WILSON, &c.
v.
ALEXANDER,
&c.

May 14, 1802.
May 19, —

1807. meeting of the creditors, the trustee was instructed immediately to appoint some fit person to manage the works. This was done. Faulds was appointed, and acted for the creditors, not for the trustee or the commissioners. If, therefore, any mismanagement had occurred, so gross and so culpable as to infer damage at all, it must be a claim against the creditors, and not against the trustee, &c.

Feb. 4, 1803. The Court, of this date, pronounced this interlocutor:—
 “Alter the interlocutor of the Lord Ordinary complained of, assoilzie the whole of these petitioners (defenders), find them entitled to their expenses, and allows an account thereof to be given in, and decern.” On reclaiming petition the Court adhered. And the accounts of expenses were adjusted of this date.

Mar. 1, 1803.
 June 11, 1803.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The only question for discussion is, the relevancy of this claim of damages. In discussing that question, the appellants are entitled to assume the facts they aver as proved,—namely, that very considerable damage was sustained, after the date of the sequestration of the Green Coal Company, and before the respondent, Mr. Alexander, the trustee, surrendered his possession to the appellant John Pettigrew Wilson, owing to the culpable conduct of the trustee, the commissioners, and the managers and overseers appointed by them to superintend the works. In these circumstances, the whole of the parties are answerable for the loss. A trustee is responsible to the bankrupt, after all the creditors are paid. The bankrupt here seeks that satisfaction, and the trustee must account to him for any misconduct in the execution of the trust reposed in him. He entered as trustee into possession of the lease, and, in virtue of the lease itself, he is responsible to the proprietor or landlord, in the present action. The commissioners are likewise liable, having not only recommended Mr. Faulds, but advised those measures which occasioned the damage; and it is therefore contended that the relevancy is beyond all question.

Pleaded for the Trustee.—The ground of the present action is, That the coal was improperly worked during his management in the sequestration, and the trustee is called as a defender, not *qua* trustee upon the bankrupt estate of the Green Coal Company, in order to found the claim against the creditors at large (for the sequestration has been recalled, and the respondent has ceased to be trustee).

but as being personally liable for the damages. But it is clear in law that an agent or trustee is not personally liable for any act done by him in the capacity of agent or trustee. The damage is not said to have been done by the respondent. He personally had no concern with the working of the coal. In appointing Mr. Faulds the manager and man of skill, he acted by the authority of the creditors. If he has done wrong, the creditors, and not he are liable.

1807.

WILSON, &c.
v.
ALEXANDER,
&c.
Rankin v.
Mollison, Feb.
17, 1738.
Mor. 4064.

Pleaded for the Respondents, Hopkirk and Edington.—

This action is altogether incompetent against the respondents as commissioners, who, in giving their advice to the trustee, acted gratuitously, and in terms of the statute by which they were nominated. They merely discharged a statutory duty to the best of their ability, in advising the trustee in what appeared to them most proper and advantageous for all parties concerned. And, whether right or wrong, there is no ground in law upon which they can be subjected in damage for having acted to the best of their judgment. No relevant circumstances are stated to make them liable, and it would have been unjust and oppressive to have allowed a proof before the relevancy of those facts were disposed of.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,—

“ My Lords,

“ This case involves questions of great importance to the law of bankruptcy in Scotland. I have considered the case with great attention ; and I think it would be hazardous, from what I see of the notes of the speeches of the judges, and from the arguments which have been adduced, to come to a final decision at present thereon. I think it will be more wholesome that it should be remitted by your Lordships to the Court below, with directions to proceed farther therein.

“ Certain of the pursuers were owners, or landladies of a colliery in the neighbourhood of Glasgow. This they let to another of the pursuers, John Pettigrew Wilson, a minor, and his father, as curator for him, for the minor's use and behoof solely. (Here his Lordship read some paragraphs of the coal lease, and the clause about leaving the stoops or pillars). Your Lordships see, that Walter Wilson, at this time, undertook, at his own hand, to conduct and manage the colliery for his minor son.

“ Having no funds to carry it on himself, partners were associated with him in the colliery. Two pits were sunk, and the coal worked for several years, when the company became bankrupts, and Walter Wilson, then the sole remaining partner, applied for seques-

1807.
 WILSON, &c.
 v.
 ALEXANDER,
 &c.

tration, the other remaining partner having previously become bankrupt. The respondent, John Alexander, under the act 33d of the king (which contains a great improvement of two former acts, relative to sequestrations in Scotland), was chosen trustee by the creditors. Two other gentlemen, also respondents in the appeal, were chosen commissioners, also in terms of that act. The trustee is paid for his trouble by the Scots bankrupt law; the commissioners more resemble the assignees in this country in this respect, and are not paid; they advise the trustee for the benefit of the creditors. The trustee and creditors resolved to make the lease of the coal available for the general behoof. They entered into possession, and commenced working the coal.

“ Unless I misapprehend the law upon this subject, the trustee is not merely such for the creditors, but also for the bankrupt. Though his primary duty is to make the most he can of the effects for the creditors, yet in Scotland, as well as in this country, the bankrupt has, in certain cases, an allowance; and any surplus that may remain belongs to him. In England, the assignees, like the trustee in Scotland, are chosen by the creditors; and, though they have no salary, they are liable to account to the creditors, and to the bankrupt, for their wilful default and wilful misconduct.

“ In this action, a condescendence was given in, the whole import of which I cannot attempt to state with precision. The Court was of opinion that it did not state facts on which they could give relief. It states, however, that the coal was worked in a very unworkmanlike manner; that proper stoops or pillars were not left, and that the roof having fallen in, the colliery was in consequence thereby ruined.

“ This condescendence was the subject of a great deal of argument, both in the Court below and at your Lordships’ bar. It was matter of discussion, whether it charged the defender with malicious, as well as wilful default, and upon this point the words, *animus injuriandi*, which occur in it, were matter of discussion.

“ This paper is not accurately expressed. I should wish those who entertain the opinion, that the trial by jury would be easily introduced into Scotland, to prove this condescendence. In upwards of fifty pages, they will see very little of what could be laid before a jury without immense difficulty. Before the trial by jury could be of advantage in Scotland, they must first alter their mode of pleading in that country.

“ In March 1797, a protest was taken by Mr. Pettigrew Wilson, and delivered to Mr. Alexander, the trustee, stating, that he had been working the colliery in a ruinous manner, and that, if this mode of working was continued, damages would be insisted for. The condescendence states, that the same mode of working was continued for a time; and that, at last, the workings were discontinued altogether, by their being drowned with water, from the ruinous manner in which they were wrought.

"The condescendence contains many suggestions and hints that there was a combination between the trustee and the commissioners to do this. In the case of such a combination, in this country, we should no doubt hold both to be liable in damages. It would certainly be a great wrong to say, that they were to be charged in this manner by hints and suggestions merely. I lay little stress on this.

1807.

WILSON, &c.
v.
ALEXANDER,
&c.

"The law of Scotland allows sequestrations to be recalled, as bankruptcies are superseded in this country. In the circumstances of this case, the bankrupt did make an application to the Court to have the sequestration recalled; and, after a long contested litigation, he was successful; the sequestration was set aside, and he got back his property. I do not enter at present into the matter, Whether this contest was blameable or not? I mention this as leading to another subject of inquiry.

"I apprehend it to be clear, that unless the enactments of the bankrupt law in Scotland are totally different from ours, there can be no doubt that the creditors, during the subsistence of the sequestration, have a right to call upon the trustee to make good all losses arising by his wilful default. There is this difference in Scotland from our bankrupt law, that, by the 33d of the king, the statutory remedy is pointed out. I apprehend that the bankrupt might also avail himself of this statutory remedy.

"In this country, it would not be necessary to show that the misconduct was malicious, if it could be shown to be wilful. After a bankruptcy was superseded, it would not be possible for an assignee, to an action brought against him for wilful default, to say, that it was now too late; that he could not be charged because the funds were out of his hands. It would be quite sufficient here to answer, I do not know how you are to make good those damages, but you are liable to me for them.

"I have looked into the notes which have been handed to us, of the judges' opinions in this case. I do not think that a great deal of attention has been paid to this case. These notes are extremely scanty. I may here mention, that, in my opinion, no regulation would be more advantageous, in cases of appeal, than for some mode to be devised for the Court to send to us an authentic statement of the grounds of judgment.

"I find principles laid down in these notes, and in the printed cases, so contrary to our ideas of the law on this subject, that it would be rash to decide at present without some inquiry into the foundation which these may have in the law of Scotland. In the printed cases, it is stated 'to be indisputably clear that an agent or trustee is not personally liable for any act done by him in his capacity of agent or trustee.'

"It is also said, in the notes of the judges speeches, that a trustee could only be charged for malicious, not for wilful default; it is stated, from a high authority, that he could be liable only out of the

1807. funds which he had to administer. If all this had been stated in a case of bankruptcy in this country, I should have said it was very extraordinary and extravagant indeed.

WILSON, & C. v. ALEXANDER, & CO.

"It was also laid down, that however the case might be during the sequestration, after it was recalled, the bankrupt could have no remedy against the trustee, but that he must apply for redress to the individual creditors. This may be well founded; but is so contrary to our ideas on the subject, that I feel it very difficult to advise your Lordships to come to any decision that would give the least hope of establishing such a doctrine.

"There is a material difference too between the conduct of Mr. Alexander, previous, and subsequent to, the protest. If it should be said, that the trustee, acting by the advice of the commissioners and of the managers approved of by them, ought not, without notice, to be liable; yet, if he were distinctly informed, as here, that the agent was ruining the works, and still persisted in the same course, in this country, this would be held to be wilful default. I am of opinion, therefore, that the case has not been distinctly considered with regard to its different periods.

"There is another material point on which we have no information. The bankrupt, in this case, was lessee of a colliery, and bound by his tack to keep and leave sufficient stoops to support the roof, and the trustee came in place of the bankrupt as lessee. If an assignee in this country, in such a case, though with the consent of all the creditors and of the bankrupt, were, by improper workings, to bring down the roof of the colliery, he, in so far as the landlord was concerned, would bring down the roof upon his own head, if I may so speak, that is, he would be liable to the consequences.

"Under these difficulties, I take this course to be best, to remit this cause for further consideration, because I cannot venture to state what hazard we may run in construing these acts for Scotland. Though, if they are not ruled by decisions, I think they must be governed by the same principles as in this country."

(His Lordship here moved the words of the judgment).

It was ordered and adjudged that the cause be remitted to the Court of Session in Scotland, to review generally the interlocutors complained of, of the 4th Feb., 1st March, and the 11th June 1803 respectively, and, after such review, to affirm, reverse, or vary the said interlocutors as shall be agreeable to justice.

For Appellants, *Samuel Romilly, Wm. Alexander, David Monypenny.*

For Respondent, the Trustee, *Henry Erskine, J. Connell.*
For Commissioners, *David Cathcart, Ad. Gillies.*

NOTE.—Unreported in the Court of Session.

1808.

ALEXANDER WILKIE, late of Kingston, Jamaica,	}	<i>Appellant ;</i>	WILKIE, &c.
Merchant,			
Messrs. JOHNSTON, BANNATYNE, & Co., Mer-	}	<i>Respondents.</i>	JOHNSTON, &c.
chants, Glasgow,			

House of Lords, 19th Feb. 1808.

SALE—JOINT ADVENTURE—LIABILITY.—Circumstances in which a party, residing in Jamaica, was held liable for goods, bought by his correspondent in this country, to be sent to Jamaica, between whom, it appeared from the correspondence, there was a joint adventure.

This case arises out of the same course of dealing which the appellant had with James Hutchison, jun., merchant in Glasgow, as set forth in the appeal in the case with Benjamin Greig, ante vol. iv. p. 265.

As there explained, Hutchison was made the medium of purchasing and shipping goods from this country to the appellant in Jamaica. The transactions originated with the appellant, in a proposal communicated in a letter, and ordering a shipment of articles out to Jamaica “on our mutual account.” This proposal was assented to on the part of Hutchison. Goods were bought, and sent with invoice thus: “Invoice of goods shipped per Cecilia, by James Hutchison, junior, Glasgow, on the joint account and risque of said James Hutchison and Alexander Wilkie, Kingston, Jamaica.”

In complying with these orders, Hutchison seems himself to have purchased these goods on credit from others. And the present question arises between parties from whom he had bought those goods, as to whether there was a copartnery or joint adventure between Hutchison and Wilkie, so as to make the latter liable as well as the purchaser of the goods.

As explained in Greig’s case, Hutchison latterly seems to have thought it proper to propose a change in the nature of the transactions between them, by a letter on 11th May 1793, whereby he proposes, if “agreeable to you, but, in either case, it shall be the same to me. What I mean is, “to send out the goods upon my own account, and you to “charge a commission.”

Thereafter, and in July, orders very pressing arrived from

1808.

the appellant for goods to be sent out as formerly, on mutual account.

WILKIE
v.

JOHNSTON, &c. and Co., and, upon inquiry, they had no hesitation to furnish goods to the extent of £460. 18s.

These letters were brought to the respondents, Bannatyne thus :—" Sold James Hutchison, junior, Glasgow, and Alex. " Wilkie, Kingston." The second entry was thus booked : " Sold James Hutchison, junior, and Alexander Wilkie." The invoices were drawn out and sent in same manner ; and, finally, a bill was drawn on 11th Dec. 1793 by the respondents, upon " Messrs. James Hutchison, junior, and Alexander " Wilkie, Glasgow, and accepted by James Hutchison, jun., " for self and Alexander Wilkie."

The appellant alleged that, in answer to the above proposal for an alteration of the transactions between them, he Aug. 5, 1793. wrote Hutchison, of this date, stating, " I have considered " your plan of doing our business in future, and I do think " it the clearest way for me to charge a commission. I have " made inquiry. The common commission for goods sent " out is 5 per cent., and for produce sent home 2½ per " cent. This I shall charge for all this order, and I have no " doubt you will be pleased with my transactions."

The respondents alleged that if this letter arrived at all, it was never shown to them. The original was never produced, and no intimation made of it whatever.

Action being raised by the respondents for payment of the sum of £460. 18s. contained in Messrs. Hutchison and Wilkie's bill above mentioned ; in defence, the appellant stated that he was never in partnership with James Hutchison, nor had ever been engaged in a joint adventure with him ; and that, while in Jamaica, he had only employed Hutchison to purchase goods for him, which Hutchison did in his own name, and that he had made remittance to him therefor. In answer, it was stated, that the above correspondence showed that there was a series of adventures between them, and that, by the special nature of the purchase, which was made in this case upon being shown Wilkie's letter ordering goods for the joint adventure, they sold the same.

Feb. 27, 1798. The Lord Ordinary, of this date, decerned in terms of the
July 11, 1799. libel. On reclaiming petition to the Court, the Lords ad—
Nov. 26, 1799. libel. On another petition the Court adhered.
Feb. 4, 1800.

Against these interlocutors the present appeal was brought to the House of Lords.

1808.

WILKIE
v.
JOHNSTON, &c.

Pleaded by the Appellant.—There is no colour or ground for supposing that the appellant and Hutchison were in partnership generally, or that they had joint concern in the goods, for the value of which this action is brought. They were concerned in certain single adventures, it is true, but without any view to partnership; but these were completely settled before the purchase of the goods in question. And the goods sent out in the present case, it is proved, were sent out on the footing that they were to be furnished by Hutchison alone, and the appellant was only to be his factor, charging a commission. Even independently of this, a foreign merchant, who procures goods from this country through or by means of his correspondent here, to whom he allows a commission, is not answerable directly to the persons from whom the correspondent has purchased the goods. All that the foreign merchant is bound to, is to make remittances to his correspondent towards payment of those goods, and, if he does so, his responsibility ceases. It is altogether erroneous to view such a person as an agent or factor, and the foreign merchant his constituent and principal.

Pleaded by the Respondents.—Prior to the transactions in question, there had been a joint trade carried on between Hutchison and the appellant, in the purchase of goods and merchandize in Great Britain, and the sale of such goods and merchandize in the island of Jamaica. The goods, in the present instance, were purchased in terms of a letter, which authorized Hutchison to purchase the goods therein ordered, either upon the joint account, as formerly, or upon his own account, charging a commission; and the goods in question were purchased on the joint account, as is proved by the special nature of the transaction between them and Hutchison. Every circumstance which occurred in the case of Greig is exactly reversed in this case. Greig had previous dealings with Hutchison upon his separate account, and stated the goods purchased in autumn 1793 to the separate account of Hutchison, in his books. The invoice, in Greig's case, was in the name of Hutchison alone, and the bill drawn by Greig for the price of the goods, at the time they were sold, was upon, and accepted by Hutchison only. But, in this case, the dealing which had taken place between Hutchison and the respondents prior to the transaction in question, was with Hutchison and Wilkie

1808. jointly. The goods were booked in their name—invoiced in their joint name—and the bill drawn on them jointly. All these circumstances show that the decision pronounced by the House of Lords, in that case, cannot apply to the present, except in so far as it furnishes grounds of affirmance of the interlocutors complained of.

After hearing counsel, it was
Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £ costs.

For Appellant, *Wm. Adam, J. A. Park.*

For Respondents, *Wm. Alexander, M. Nolan, Thomas H. Bax,*

[Mor. App. 1. Foreign No. 6.]

WM. SHEDDEN, only Son of the deceased William Shedden of Rughwood, in the County of Ayr, sometime Merchant in New York; and HUGH CRAWFORD, Merchant in Greenock, his Factor <i>loco tutoris</i> ,	} <i>Appellants:</i>
DR. ROBERT PATRICK of Trearne, in the County of Ayr,	
	} <i>Respondent.</i>

House of Lords, 3d March 1808.

LEGITIMATION PER SUBSEQUENS MATRIMONIUM—FOREIGN—ALIEN—NATURALIZATION ACTS.—A Scotchman had settled as a merchant in New York, and had become domiciled in that country. In 1770 an heritable estate devolved on him in Scotland, but, on this event, he did not return to Scotland. Ann Wilson lived with him in America; and the result of this connection was, the birth of two children, of whom the appellant, William Shedden, was one. In 1798, when on deathbed, he married their mother in America, by a regular marriage, performed by a clergyman; and the question raised in a reduction were, 1st. Whether this marriage, celebrated in a country which did not recognize the law of legitimation by the subsequent marriage of the parents, was nevertheless good to legitimate the child, claiming heritable estate in Scotland, where that law was recognized? or, Whether the status of legitimation was to be decided according to the law of America, where he was born, and his parents resided, or according to the law of Scotland? 2d. Whether, being born out of the allegiance of the King

of Great Britain, the appellant came within the protection and exceptions created by 7th Anne, c. 5, and 4th Geo. II. c. 21, § 1, or any other act which naturalizes the children of British parents, born out of the ligeance of the Crown of Great Britain? Held such a person not entitled to succeed to heritable estate in Scotland. Affirmed in the House of Lords.

1808.

SHEDDEN, &c.
v.
PATRICK.

William Shedden, the appellant's father, was the only son of John Shedden of Rughwood, who died in 1770. At this time, William Shedden, the appellant's father, had been settled in New York as a merchant, having gone to America in 1763; and when this Scotch estate devolved on him, it was under the management of the respondent's father.

William Shedden had formed a connexion with a woman of the name of Ann Wilson, by whom he had two children, William, the appellant, and Jean, an infant. Several years thereafter, and when it was alleged he was on deathbed, he entered into a regular marriage with their mother, which was celebrated according to all the forms and solemnities prescribed by the laws of the United States.

Nov. 1798.

A few days after the marriage Mr. Shedden died, having executed a settlement of his American property in favour of the two children of this marriage, and of a child by another mother. Nothing was mentioned in the deed of the landed estate in Scotland. But, in the settlement, Mr. Shedden directs his executors to send the appellant, his only son, to Scotland, and he appointed as his sole guardian Mr. William Patrick, the respondent's brother.

The appellant arrived in Scotland accordingly, and was put to school at Dunfermline. In the meantime, Mr. Wm. Patrick, finding that his brother, the respondent, meant to claim the property, declined to accept the guardianship of the boy. The American property was insufficient to pay the deceased's debts. There was a difficulty therefore in furnishing funds to support his claim to the estate; but these got over, Mr. Hugh Crawford was appointed his factor *loco tutoris*.

An action of reduction was then brought in the name of William Shedden and his factor *loco tutoris*, to set aside the service of the respondent (who, after the appellant's father's death had got himself served heir at law in special to the deceased), on the ground that, being the lawful son and heir of the last proprietor, he was the only party entitled to succeed to his father's estate in Scotland.

1808. The Lord Ordinary made *avizandum* to the Court on memorials.

SHEDDEN, &c. The facts of the case were : Wm. Shedden went to America in 1763, remained until 1769, when he paid a short visit to his friends in Scotland, but returned in a few months to America, and settled there as a merchant, and never again returned to this country. In 1783, when the Independence of America was established, Mr. Shedden went to reside in New York, where he formed a connection with Ann Wilson, a native of America, and had two children by her, namely, the appellant and a daughter. It was admitted that, during the latter period of their connection, they cohabited and resided in the same house together.

v.
PATRICK.

In autumn 1798 Mr. Shedden was seized with a consumptive complaint, which threatened to put a speedy termination to his life. He was so weak as scarcely to be able to stir without assistance, and he was so convinced of his dissolution himself, that he caused letters to be written home to Scotland to his friends to that effect. While in this weak situation he was induced, it was alleged, by the solicitation of Ann Wilson, to solemnize a marriage with her, the ceremony being read over to him as he lay in bed. It took place on 7th November, on which day also he executed the settlement above referred to, and he died on the 13th Nov. In a few days afterwards Ann Wilson married Mr. Vincent, the master of a vessel in the employ of Mr. Shedden.

These being the facts of the case, which were not disputed by the parties, the questions arising upon these facts were:—

1. Whether a person who is a bastard by the law of the country where he was born, and where his parents were domiciled, can inherit as a legitimate son in Scotland, by reason of the subsequent marriage of those parents, although that marriage had not the effect of legitimating him in his own country, where it took place, and where he can never succeed to any property by descent, or in virtue of personal representation?

2. Whether the appellant, being born out of the allegiance of the King of Great Britain, comes within the protection and exceptions created by 7th Anne, c. 5, and 4th Geo. II. c. 21, § 1, or any other act which naturalizes the children of British parents born out of the allegiance of the Crown of Great Britain?

On these questions, it was argued for the respondent, that the appellant was illegitimate, and that the question being therefore one of *status*, must be decided by the law of the previous domicile; that the appellant was born in America, and that his father was domiciled there;—that the law of the United States does not recognize legitimation by the marriage of the parents subsequent to the birth of the children:—that being a bastard by this law, the appellant is therefore a bastard all the world over, and cannot claim a Scotch estate as heir *ab intestato*, any more than he can claim an estate in America. 2. Independently, the appellant is an alien, and, as such, incapable of succeeding to heritable estate in Scotland. Nor does he fall within the benefit of the naturalizing statutes of 7th Anne, c. 5, and 4th Geo. II. c. 21. By the words of the first of these acts, it was left doubtful whether the mother as well as the father required to be a natural born subject of Great Britain; or if not, whether the privilege of naturalization did not extend to children born of mothers who were natural born subjects, although the father was an alien. The 4th Geo. II. c. 21, removed these doubts, and confined the privilege to the children of British fathers. The material words are: “That all children born out of the ligeance of the Crown of England or of Great Britain, whose fathers were or shall be natural born subjects of the Crown of England, or of Great Britain, at the time of the birth of such children respectively, shall be adjudged and taken to be, and are hereby declared to be natural born subjects of the Crown of Great Britain.” It cannot be denied that a bastard, as being *nullius filius*, is not a child within the meaning of these acts. But what the appellant contends for cannot hold, that though no bastard has a privilege by these acts, yet they save the rights of children born of a British born subject, in so far as the law operates in legitimizing children by the subsequent marriage of the parents,—the fiction of the law being, that the parents were married at the time he was begotten,—and, therefore, that he was and is, in the sense of the law, a *filius legitimus* from the beginning.

The appellant contended that the whole question related to land estate in Scotland, in regard to which the laws of Scotland must govern, whatever be the rule otherwise in regard to moveable estate. The rights and succession to

1808.

 SHEDDEN, &c.
 v.
 PATRICK.

1808. land estate must be decided by the laws of the country where it is situated. And, by the law of Scotland, no rule is more clearly settled than the legitimation of children by the subsequent marriage of the parents; and the rights of a son so legitimated, entitle him to succeed to heritable estate *ab intestato*, just as a lawful son. That the marriage of the parents in America being perfectly valid in the *locus contractus*, must be valid all the world over, and must fix upon him the character of legitimacy, which the Scotch law recognizes in children whose parents were legally married; that he is therefore the *lawful son* of the late William Shedden, and entitled to succeed to him. 2. That the naturalization acts protected him from alienage, because he was the lawful son of a British born father, and, as such, entitled to the privileges thereof.

On reporting the case to the Court, the Lords pronounced July 1, 1808. this interlocutor: "Repel the reasons of reduction, assolzie the defender, and decern."*

* Opinions of the Judges:—

LORD PRESIDENT CAMPBELL said:—"The defender having already expedite a service, as nearest and lawful heir, the pursuer, who challenges that service, and assumes the same character, must make out his title in the same way as if he had taken out a competing brief.

"He states himself to be *legitimus et propinquior hæres lineæ* of his deceased father, and, if he can establish that character, he must prevail; but the answer made to this claim is bastardy, to which it is replied, that there was legitimation by subsequent marriage of his father with his mother. Duplied, that a subsequent marriage cannot, by the law of New York, the place of his own nativity, and of his father's residence, have that effect. Answered. His claim is to the succession of a Scots estate; and the law of Scotland must be the rule.—Here the parties join issue on a very important and general question of law.

"One peculiarity attends the pursuer's argument, viz. that he cannot maintain his legitimacy throughout: for he claims only a partial, not a complete state of legitimacy. He admits that he cannot make no claim to any personal estate, even that which was undisposed of by his father's will, but must allow it to be taken by a more distant relation, as nearest in kin, so that *quoad hoc* he is illegitimate although he contends that *quoad* the heritable estate, he is legitimate so that he is partly lawful and partly otherwise. This is a case in which probably there is no other example.

"There are certain personal qualities, which must be inherent in

Against this interlocutor the present appeal was brought to the House of Lords. 1808.

Pleaded for the Appellants.—1. The marriage of the appellant's parents must be deemed valid, whether it is judged of SHEDDEN, &c.
v.
PATRICK.

and accompany the person every where, and in all circumstances, or not exist at all. Thus, a person must either be married or unmarried, and cannot at one and the same time be both the one and the other, or half the one and half the other. The state of marriage is undivisible; the state of legitimacy, it is presumed, must be the same. Thus also, every person must have a *forum priginis*, i. e. he must be born some where, and must be a subject of a bare allegiance to some one country or another, and this character is indelible, unless forfeited upon commission of a crime inferring such forfeiture, in the same way as marriage is indelible till dissolved in a legal manner. The character of a lawful child is equally indelible, when once constituted by a marriage or legitimation, and must be an inherent quality in that person all the world over. This, at least, is the general result of the *jus gentium universally*. If there be any country or place where it is otherwise, this must arise from some particular arbitrary constitution, which cannot bind other countries, being against the fixed principle of general law all over the world.

"The claim, therefore, made in this case, being of a nature inconsistent with itself, and with general principles of the law of nations, which make a part of the system of the general law of every country, must be narrowly examined, before we can admit it as having that legal effect in this country which he contends for.

"The pursuer is *prima facie* an alien to this country, having been born in one of the American States, and he can only take himself out of the situation of alienage, by pleading upon the statute 7th Anne, c. 5, and 4th Geo. II. c. 2.

"These acts can only relate to lawful children, and, before he can take the benefit of them, by succeeding to the land estate here, he must prove that he is a lawful child. He admits that he was for some years in a state of illegitimacy, and, consequently, for some time, he neither could take the benefit of these acts, nor make himself out in a claim of service to be *legilimus et propinquior hæres* of his father; but he maintains, that at an after period he became lawful, by the marriage of his father and mother at New York; and that, being thus constituted a lawful child, he, at his father's death, was entitled to the benefit of the acts of Queen Anne and Geo. II.; and to the right of serving heir, to the effect of taking up an estate in Scotland; such being the legal consequence of that marriage by the law of Scotland, if not by the law of New York.

"But, supposing there had been no estate in Scotland, could the marriage of his father and mother at New York have drawn him out of the state of illegitimacy and of alienage, so as to enable him

1808. according to the law of the place where it was contracted,
 or according to the law of the husband's own country, viz.
 SHEDDEN, &c. Scotland, where the question regarding it has arisen. The
 v. cohabitation of the parties, the certificate by the clergyman
 PATRICK.

to maintain any other right here or elsewhere, in the character thus assumed by him? *e. g.* Could he have succeeded to an estate in England, or to a title of peerage? Certainly not. He must have remained illegitimate and an alien to all intents and purposes, here and everywhere else.

"Supposing his father had been a peer of Scotland,—this is a species of right which may be taken up without service. Could he then, with a certificate in his pocket of his reputed father's marriage with the woman who bore him, have come from New York and assumed the title of peerage here, as descending to him by the law of Scotland, though neither at New York nor in England, could he be received in any other character than that of illegitimacy?

"Supposing the father had been both an English and a Scotch peer, and that there had been another son born after marriage, would the one son, of the same father and mother, have been an English peer, and the other a peer of Scotland? Or can there be such a thing as the same man having two sons, both of them his heirs-at-law, contrary to the law of primogeniture, which is the common law both of England and Scotland?

"The distinction laid down in these papers between the constitution of a status, and the legal effects and consequences of that status, when so constituted, is no doubt well founded; but, in the pursuer's argument, it is misapplied. The *questio status* here, is not, whether the father and mother were married, and what was the result, or consequence of that marriage, so far as the state either of the husband or the wife was concerned? The marriage was certainly a good one, not only by the law of New York, where it was entered into, but all the world over; but the legal rights arising from such marriage, either to the husband or to the wife, might be different in different countries, where implement or execution might be demanded. Thus the husband might be entitled to what is called the courtesy in Scotland, but not in New York or in England, and the wife's dowry might be different in these different countries. These are legal results from the state of marriage, which might vary according to the municipal laws of each country; but still the marriage being certain, no doubt could be entertained as to the title of the one party or the other, to assume the character of husband or of wife, and to make their demands in that character.

"But the question at present before us, does not regard the status either of the husband or the wife, or any demand resulting from that state, either to the one or to the other. It relates to the status of a person said to be their child, and to a demand made on the part



who performed the ceremony, and the acknowledgment of marriage in Mr. Shedden's will, constitute more evidence than the law of Scotland requires to establish the nuptial contract. Its validity, by the law of the United States, if

1808.

SHEDDEN, &C.
v.
PATRICK.

of that child, of being put in possession of a certain right, which he claims as the result of a certain pre-supposed state assumed by him.

"In other words, he holds the state assumed by him to be already constituted, and then he makes his demand as a necessary consequence of that state. This, however, is begging the whole question; for he must begin with establishing the constitution of his state as a lawful child. If he prevails in so doing, he will, of course, succeed in the conclusion which he draws from it; but if he fails, the reverse must appear.

"Now, the difficulty which meets him in the outset is, that he was born a bastard; and he never enjoyed any other state in the country to which he belonged, and where his father lived and died; and nothing was ever done here to put him in any other state, nor is now possible to be done, unless it can be said that the mere opening of a succession in Scotland, which, had he been a lawful child, would have devolved upon him, does *eo ipso* make him lawful?

"Suppose, for example, the estate which is here in question, had never belonged to the father, but had descended from some collateral relation, to whom the father, had he been in life, would have been the nearest lawful heir, but failing him, the succession must, of course, be taken by the next lawful heir, could he have taken out briefs to be served *legitimus et propinquior hæres* to this collateral relation, upon the ground assumed by him, that his legitimacy being pre-supposed, he is the nearest and lawful heir of the deceased relation, in consequence of his being the lawful son of his father? In the case here supposed, he derives nothing from his father. He did not derive his state of legitimacy from him in his own country, he derives no estate from him in this country, which could give him a pretence for claiming to be *legitimus et propinquior hæres* of his father. Any service as heir to his father would be inept, because he can take nothing from him. Yet it is maintained that he may serve, through his father, as his lawful son; and, consequently, entitled to the succession of his father's relations, when, in truth, he never enjoyed any other relation to his reputed father but that of illegitimacy. Marriage of the parents does not necessarily establish the legitimacy of children here: for, *e. g.* there might be a *medium impedimentum*. The pursuer argues in a circle, when he says, give me the estate, because I am lawful,—and declare me to be lawful, because I have so succeeded."

LORD HERMAND.—"The state of legitimacy is a prejudicial question. The pursuer, I think, does not make out his legitimacy."

LORD CRAIG.—"I have some doubt, where it is a mere question of status, Whether it is not a question of succession, *i. e.* what are

1808. the *lex loci* is to be followed, has been sufficiently proved
 by the documents produced by the respondent himself.
- SHEDDEN, & CO. 2. There are certain principles, of extensive application,
 *
 PATRICK. adopted in the jurisprudence of every nation, different from,
 and often quite repugnant to the principles upon which the
 laws of other nations decide the same general questions.
 The law of some countries recognize the right of property
 over *men* almost as unlimited as over cattle; in other coun-
 tries a similar right is admitted, but under greater limita-
 tion. In many countries, a right over human beings as pro-
 perty is totally denied. Thus the fundamental principles of
 law, with respect to the qualities, the conditions, or the
status of persons, are different in different countries; and
 the law of each views these qualities in a way peculiar to
 itself. In one country, it is a fundamental doctrine that a
 man may be sold or bequeathed like a horse. In another,
 that he may be sold with the land to which he is attached.
 In a third, the doctrine is, that a man cannot be the subject
 of commerce at all. If a Russian landholder comes into an
 English court of justice, and demands the restitution of his

the rights of the parties? I rather think that the marriage being constituted, both the status and the right of succession to the estate here must follow. Suppose the right of primogeniture not the law of that country, must we not follow our own law in that particular?"

LORD ARMADALE.—"The whole question is, Whether he be legitimate or not? The question of his status must be resolved by the law of his own country; and *there* legitimation, by subsequent marriage of the parents, does not apply."

LORD WOODHOUSELEE.—"I am of the same opinion. The same person cannot be partly legitimate and partly illegitimate."

LORD BALMUTO.—"I am of the same opinion."

LORD CULLEN.—"We are bound to give effect to foreign deeds and foreign transactions, but not to a different effect from what is given to them in the country where they were entered into; therefore, as, by the law of New York, the subsequent marriage of the parents did not legitimate the child previously born, it can have no effect here."

LORD MEADOWBANK.—"Suppose an Englishman comes down and marries at Gretna Green, and then returns. This will not legitimate the children born before marriage in England. It is a question of right not of comitas. The question of propinquity is a question of the law of the country where the party was born and domiciled."

Repel the reasons of reduction.

Lord President Campbell's Session Papers, vol. 110.

vassal, who has escaped from his domain, he is told that villenage is unknown in our law, and that the laws of England will not enforce his claim. A West Indian Planter was stopped, by the same principle, when he claimed a slave, to whom he had undoubted right in the country where the contract took place, which gave rise to his action; but he was told that the laws of this country did not recognize slavery. Had the *essentials* of his contract been such as those laws permitted, he would have been allowed to try its *formalities* by the laws and customs of the country where it was entered into; but the *substance* of the agreement was contrary to the principles of both English and Scotch law, and accordingly the judicatures of both countries refused to give effect to it,—the Court of Session in the case of Knight *v.* Wedderburn,* and the Court of King's Bench in that of Somerset,† after the most ample discussion. Thus too, the judicatures of this country support marriages between British subjects abroad, although solemnized according to the forms and ceremonies of the place where the parties were resident, because the use of the form is to afford evidence of the consent of the parties. But if an Englishman were to marry two wives in Turkey, the second would in vain assert her claim in this country, upon the ground that the two marriages were equally valid in the place where they were contracted. She would be told that our laws do not contemplate the possibility of a person contracting a second marriage during the subsistence of the first. All these are, in the strictest sense, questions of *status*; nevertheless, they are decided, not by the law of the country where the persons have their domicile, or where the contract that gave rise to them was made; but by the law of the country where execution of the contract is demanded, and acknowledgment of the *status* claimed. It seems therefore impossible to assign any reason for excepting from this class of cases the question of legitimacy.

3. It thence appears, that the argument which considers this case a question of *status* is altogether favourable to the appellant. But his advantage must be still more apparent, when the discussion is put upon the proper ground; for he submits that it is a question upon the *effects* due to the contract *ex vi legis*. It has been stated, that different sys-

1808.

SHREDDEN, &c.
v.
PATRICK.

* Knight *v.* Wedderburn, 15th Jan. 1778, Mor. p. 14545.

† Somerset *v.* Stewart, 14th May 1772; Lofft. vol. i. p. 1, King's Bench, Easter Term.

1808.
 SHEDDEN, &c.
 v.
 PATRICK.

tems of jurisprudence apply very opposite principles to determine the validity, or to define the nature of contracts. In some countries personal arrest is unknown. If a debt incurred abroad, is sued for and established in England or Scotland, will it be a sufficient objection to the creditor's privilege of using personal diligence, that by the *lex loci contractus* no such diligence is allowed? Or will an English creditor be permitted, by the judicature of a country where personal arrest for debt is unknown, to imprison his debtor, upon the ground that the law of England allows it? Undoubtedly not. The *constitution* of the claim will be judged of, in both cases, by the law of the country where the contract was made; but *effect* will only be given to it in so far as such effect is not repugnant to any fundamental principle laid down by the law which is required to enforce it. Here then, in claiming Scotch estate, as the lawful son of William Shedden deceased, the appellant's legitimacy, by the subsequent marriage of his parents, can validly be founded on, because the law of Scotland recognizes that rule; and it is no answer to this to say, that by the laws of America, where the contract of marriage was made, legitimacy *per subsequens matrimonium* of the parents has no place, because, both upon the principle above set forth, and also, because every question connected with land estate in Scotland must be decided by the law of that country, and no other, the law of America cannot be applied. If, therefore, by the law of Scotland, he is to be held a *filius legitimus*; and, if added to this, his father is to be presumed as a domiciled Scotsman, from possessing estate there, and the appellant himself now actually domiciled there, then he is entitled to succeed, and the naturalization acts 7th Anne, c. 5, and 4th Geo. II. c. 21, on the supposition of his being incapacitated, from being an alien, would entirely protect him—his father having been a British born subject.

Pleaded for the Respondent.—1. The first question is, Whether the appellant's status, as to legitimacy or illegitimacy, is to be decided according to the law of America, where he was born, and his parents resided, or according to that of Scotland, where he claims to succeed to an inheritance. The respondent contends, that this question must be decided according to the laws of America, where he was born, and where he and his parents were domiciled; and he having been born a bastard, and the subsequent marriage of his parents, according to the law of America, not having the effect of legitimating children previously procreated between

ever status the law of America affixed to children
ore the marriage of their parents, that status must
th them wherever they go. The case of the slave
o this country, and being that moment free, arises
otally different principle altogether, derived from
ional law, and founded on principles peculiar to the
f the British constitution. Nor do the cases of
lecrees, &c. apply, because the principles, in re-
hem, proceed from the comitas due to foreign laws.
ellant, feeling the force of this argument, is anxious
his case to another principle. Instead of consider-
elation of parent and child as a positive status sub-
etween them, he regards it as the mere consequence
atus of husband and wife. He labours to maintain,
e, that the legitimacy of the issue is only an effect
ontract of marriage, and, like all other effects of a
must be decided by the law where execution of
anded.

if it be supposed that this, his rule respecting con-
s universally true, which it is by no means the case,
s misapplied. The *status* of the child is not to be
ed as a case of contract. An unborn infant cannot
ty to a contract; and none exists between him and
nt. His *status*, as to legitimacy, depends upon a
principle. It is a character which the law allows
nts to impress upon their child, as being the imme-
urces of its being. *Their will* to do so is mani-
n most countries by the celebration of marriage;
av be evidenced by other means. It is clear, there-

1808. riage in this case, subsequent to the birth of the appellant
the latter's legitimacy can only be judged of according to
the laws of America, which do not admit of legitimation *pe*
subsequens matrimonium.
 SHEDDEN, & CO.
 v.
 PATRICK.

The next argument used for the appellant is, that if the *status* of the child is to be determined by the law of the father's domicile, *that* of the appellant's father was not in America solely, inasmuch as both *ratione originis*, and from having property in Scotland, he was subject to the jurisdiction of the courts of Scotland, and must be held as domiciled there. It is true, that the father was subject to the jurisdiction of the Scottish courts, so far as that might be necessary to constitute any claim against him; and, upon these grounds, he might have been successfully prosecuted for payment of a debt, by reason of his having an estate in that country. But in what way could any question have been tried, which involved the *status* of himself, and his wife and children, none of whom were either in the country, or had property, by which they might be subjected to the jurisdiction of its laws?

The appellant, who is willing to take the question in its alternative, next observes, that, supposing his legitimacy does not depend upon the domicile of the father, but upon that of the son, further discussion is even on that supposition unnecessary, because the appellant is domiciled in Scotland, where he resides, and where it was desired by his father's settlement that he should be educated. It is not easy to see how an infant, who can have no will of his own, can change his domicile. But if the law were otherwise, this compendious mode of deciding the case only evades the question. The point is not where he is domiciled now, but what his situation was at the time of his birth, and of his father's death? If he was then a bastard by the law of America, the only country which at that time had a right to judge of his situation, this character must remain with him; and even if he should afterwards obtain letters of legitimation in this country, they cannot have the effect of injuring third parties, or of enabling American bastards to succeed to heritage in this country to the prejudice of the lawful heirs.

Lastly, the appellant, despairing of success upon the question of domicile, gets out of humour with them, and boldly takes up the argument in their defiance. He insists, therefore, that as the succession to moveables *ab intestato* is regulated by the law of the deceased's domicile, upon the legal fiction, that, having no permanent *situs*, they are pre-

sumed to be in the place of his domicile at the time of his death ; so, *ex paritate rationis*, his right to the real estate is to be decided by the *lex loci rei sitæ*, since no man has ever denied that all questions concerning heritable estates must be decided by the laws of the countries where these estates are situated. The respondent desires no other supposition to illustrate the error of that principle for which the appellant contends. The *lex domicilii* is not less extensive in its powers over the defunct's moveables than the *lex loci rei sitæ* is with reference to his heritable estate. Yet, was it ever supposed that the law of the parent's domicile is not only to regulate the succession to his moveables, but that it must likewise decide, according to its own rules, upon the legitimacy of his children, under whatever circumstances, and in whatever country they were born ?

An Italian or Scotsman, in whose countries the law of legitimation, by the subsequent marriage of the parents, prevails, has, while dwelling in his native country, children by a woman whom he afterwards marries there. Subsequent to this, he becomes domiciled in England, where he acquires personal property, and dies. Is the law of England to decide upon the legitimacy of his children by its own rules, and disinherit them as bastards ? Yet, if it does not, how can the *lex loci rei sitæ* decide it as to real property ? The respondent does not mean to deny, that neither the law of Scotland, nor that of any other country in which the feudal system prevailed, will suffer its rules respecting heritable or immoveable property to give way to the laws of another state. This rule is founded on the maxim already mentioned, that no state will give due effect to the municipal institutions of another country, which are repugnant to its interests and its laws, and which might be enacted for the purpose of binding an independent people in their own territories.

2. But the respondent humbly submits, that whatever the difficulty of this question may be, it is unnecessary for your Lordships to decide upon it in the present case. The appellant was born in *America*, after the independence of that country had been acknowledged by Great Britain in 1783. According to the law, as it stood antecedent to the Union of the two kingdoms of England and Scotland, he was an alien, born *extra fidem domini regis* ; and being the natural born subject of a distinct and independent state, could neither enjoy nor succeed to a feudal subject in the country

1808.

 SHEDDEN, &c.
 v.
 PATRICK.

1808. of Scotland, to whose sovereign he owed no allegiance, as
 _____ a duty incident to his birth. It was admitted in the Court
 SHEDDEN, &c. below, as a point too clear to be capable of dispute, that the
 v. appellant was an alien, and incapable of succeeding to the
 PATRICK. estate of Rughwood, unless he was entitled to the benefit
 of the naturalizing statutes of 7th Anne, c. 5, and 4th Geo.
 II. c. 21. The respondent contends, that he comes neither
 within the letter nor the spirit of these statutes, but remains
 an alien born, unnaturalized, and incapable of inheriting real
 property. The words of the 7th Anne, c. 5, are, "That
 " the children of *all natural born subjects born out of the*
 " *ligeance of her majesty, &c. shall be deemed, adjudged,*
 " *and taken to be natural born subjects of this kingdom, to*
 " *all intents.*" Some doubts having arisen whether it was
 required by this act that the mother should be a natural born
 subject as well as the father; or whether the privilege did
 not extend to children born of mothers who were natural
 born subjects, although the father was an alien, the 4th Geo.
 II. c. 21, was passed, the words of which are: "That all
 " children born out of the ligeance of the Crown of *Eng-*
 " *land, or Great Britain, whose fathers were, or shall be*
 " *natural born subjects of the Crown of England or of*
 " *Great Britain, at the time of the birth of such child-*
 " *ren respectively, shall be adjudged and taken to be natu-*
 " *ral born subjects of the Crown of Great Britain.*"

It neither is, nor can be denied, that a bastard, as being
nullius filius, is not a child within the meaning of these
 acts, and that such a person, although the offspring of
 British parents, is, when born out of his Majesty's allegiance,
 as much an alien by the law, as it now stands, as he would
 have been if these statutes had never passed. But the appel-
 lant argues, that, by the subsequent marriage of his father and
 mother, that alienage was taken off, upon the fiction of law,
 which supposes his parents to have been married at the
 time he was begotten, so that he was legitimate from his
 very birth; but the respondent contends, that this fiction of
 law can work no such effect. The statute requires that the
 father should be a natural born subject *at the time of the*
child's birth. But it is impossible to say that this child had
 a father who was a natural born subject at the time of the
 birth, when, in the contemplation of law, he had no father
 at that period, either alien or native.

After hearing counsel,

The LORD CHANCELLOR ELDON,

1808.

In moving the judgment in this cause, stated, "that he had consulted with the learned peer who had attended the hearing of this appeal, (Lord Redesdale, who was not then in the House), and whose opinion on the subject coincided with his own; and that, as it was not usual to state any reasons for affirming the judgment of the Court below, he should merely observe, that the decision in this case would not be a precedent for any other which was not precisely the same in all its circumstances." He then moved that the judgment of the Court of Session should be affirmed, which was accordingly ordered.

SHEDDEN, &c.
v.
PATRICK.

It was therefore ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Andrew Fletcher, Henry Brougham.*

For the Respondent, *Sir Samuel Romilly, M. Nolan.*

NOTE.—The question in the above case was again revived many years thereafter, by Mr. Shedden seeking to reduce the decree formerly pronounced, on the ground of fraud; but the Court of Session, after much discussion, dismissed the action; and this judgment was affirmed on appeal. There is an interesting report of the case, as decided in the House of Lords, in Mr. Macqueen's House of Lords' Reports, vol. i. At p. 568, in alluding to the above case, he says, 'Of this judgment, the only record remaining is but the formal entry, which appears in the Journals of the House, no note taken at the time of the opinions delivered being now forthcoming.' This is incorrect, in so far as it supposes that any opinions could be delivered, in judgments of affirmance, at that time, the rule of the House then being, to state no reasons where the judgment of the Court below was to be affirmed. He is also wrong in stating Lord Redesdale was present at moving judgment. His Lordship had been present at the hearing, and had even been present in the House that day, but was absent when judgment was given.

The ground on which the judgment was given in the House of Lords, in the above case, it is stated upon the authority of Lord Redesdale and Lord Brougham, 'was, that the child was born an alien.'—Vide Mr. Macqueen's Reports, p. 632.

1808.

EARL OF
WEMYSS
v.
MACQUEEN
&c.

[Mor. App. I. Stipend, No. 6.]

THE EARL OF WEMYSS,	<i>Appellans</i>
REV. DANIEL MACQUEEN, Minister of the Parish of Prestonkirk, and JOHN CON- NELL, Esq., Advocate, Procurator for the Church of Scotland,	<i>Respondents</i>

House of Lords, 20th May 1808.

AUGMENTATION OF STIPEND—JURISDICTION AND POWERS OF COURT OF TEINDS.—The minister of Prestonkirk had, in 1806 he applied for a second augmentation, which was opposed by the appellants on the ground that, his stipend having been once augmented, the Court of Teinds had no further power to grant a second augmentation to the minister. Held him entitled to the augmentation and that the Court had power to grant him such. Affirmed by the House of Lords, with a variation, which see.

The question in this case was, Whether the judges of the Court of Session, as Commissioners for the Plantation Kirks and Valuation of Teinds, have by law the power of augmenting the livings of the Established clergy, from time to time, at their pleasure, till the whole tithes of Scotland are exhausted or appropriated? It was stated, that the power to augment, at their discretion, was vested in the judges as a *Committee of Parliament*, while it was, on the other hand, admitted that they may be controlled in the exercise of that discretion by the House of Lords in a *judicial capacity*; which the appellants maintained was a contradiction in terms; because, if they had a *discretion as a Committee of Parliament*, then their decision on augmentations would be final, and not subject to judicial control or review. The respondent farther maintained, that if the doctrine of the appellants were correct, that the Court had this unlimited discretionary power of augmentation, then there would be no end to augmentation.

The circumstances out of which the present case arose were:—That, in 1793, the respondent brought an action for augmentation, and had modified to him, inclusive of stipend, 21 bolls of wheat, 45 bolls of barley, 65 bolls of oats, and £46 sterling in money, with £5 for commutation elements. These were equal to £218 per annum, exclu-

of manse and valuable glebe. But, not satisfied with this, he brought, in 1806, another process of augmentation within the twenty years. And it was then objected to by the appellant, on the ground of *want of power in the Court*. In answer, the respondent contended, that the judgments of the House of Lords, in the cases of Kirkden and Tingwall, and the subsequent practice of the Court, were conclusive against the appellant's plea.

1808.

EARL OF
WEMYSS
v.
MACQUEEN,
&c.
Vide ante.

The Lords' Commissioners pronounced this interlocutor: Feb. 3, 1808.

—"Find that this Court, having been established by an act in the year 1707, as a permanent Court of Commission, in place of the former temporary commissions, for the purpose, *inter alia*, of modifying and augmenting the stipends of parochial ministers out of the teinds, it is the duty of the Court, and within its powers, as recognized by the House of Lords in the two decided cases in the years 1784 and 1789, and by the uniform practice of the Court, acquiesced in by all parties, in a great variety of instances, ever since the last mentioned period, to receive such applications, when made in the regular form, and to determine upon them according to the state of matters at the time, and the merits of each particular case, notwithstanding a former augmentation, since the institution of the Court; and, therefore, that the present case must be allowed to proceed as usual."

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—That it was impossible for any person reading attentively the statutes on this subject of augmentation, and the Court's powers therein, from the Reformation to the Union, and particularly those which passed in the early part of the reign of Charles the First, and the transactions of that period, without being convinced that the intention was to fix the stipends of the parochial clergy at once and for ever, at least so far as they were to be payable out of the teinds. The question, therefore, Whether the present commissioners have the power of augmenting the stipend of a parish repeatedly at their discretion, so long as there are free teinds, has never been decided in the affirmative by the House of Lords. Nay, it was solemnly decided in the negative by the Court of Session in the case of Tingwall in 1787, and there is not a single decision or dictum since to support the practice, except the seeming application of the judgment of your Lord-

1808.

EARL OF
WEMYSS
v.
MACQUEEN,
&c.

ships' House in the Tingwall case, upon a supposition, which, if it was entertained, proceeded upon error, as no such power is given by the statute 1707.

Pleaded for the Respondents.—The plea set up by the appellant in the present cause, of the want of jurisdiction in the Court of Teinds, has been twice repelled by solemn decisions of the House of Lords; and these decisions have been followed by an exercise of their jurisdiction in upwards of 800 cases, which cannot now be stirred or questioned in any court of law. Yet, were the question new, still the Court of Teinds has full power, and is fully authorized, by the different statutes upon which their powers are founded, to grant augmentations of ministers' stipends out of the tithes of Scotland, from time to time, as the circumstances of each particular case require.

After hearing counsel,

The EARL OF LAUDERDALE read a speech, concluding with a motion that this judgment should be reversed.

The LORD CHANCELLOR ELDON said,

“ My Lords,

“ Attending to the infinite importance of this cause, not only affecting the parties immediately concerned in it, but as it must necessarily affect the interests of both clergy and laity in Scotland. I feel concern that I have been able only to abstract, from other professional duties, a portion of time insufficient for methodically arranging my opinion as to those grounds on which I must dissent from the motion of the noble Baron who has just sat down.

“ I feel the more concern on this account, because it is impossible not to admit that his Lordship has done justice to the opinion which he entertains, and has delivered his sentiments in a judicial manner.

“ The question for your Lordships to decide is, If you shall affirm or reverse, or alter the interlocutor appealed from? The proposition made by the noble Lord goes in substance to reverse the judgment; and he prefaced his proposition by stating certain principles on which he wished you to adopt his motion.

“ There are various propositions stated in the interlocutor, to which it will be necessary to attend; it appears to me that it requires alteration. But the alterations which I shall propose do not go to reverse the judgment in substance, but only in so far as it predicates certain facts and grounds of judgment. (Here his Lordship read the interlocutor appealed from).

“ I conceive you would not much approve of the terms of an interlocutor, stating itself to be founded on certain former judgments of this House, as to the point of law now in question, if such state-

ments be not warranted by the words of those judgments. So far as the interlocutor also is founded on the uniform practice of the Court since that period, and the acquiescence therein, we can scarcely form an opinion as to such acquiescence; it is of itself no slight matter, but it does not enter into the record.

"As to the cases alluded to in the interlocutor, I cannot think that the cases of Kirkden and Tingwall, in their terms, settled the general point. In the Kirkden case, a noble and learned Lord certainly conveyed a strong opinion on the subject; but this opinion cannot be represented to have been embodied in the judgment of this House.

"If the law, as contained in the acts of Parliament, be quite clear, I know nothing more dangerous than it would be to set up precedent against it. But I know I am speaking in England, where a long and inveterate usage has prevailed, even against an act of Parliament, in the case of common recoveries. Though I never could have consented to this originally, as contrary to law, yet the consequences of overturning what has been done by these common recoveries, is such, that no lawyer would now think of altering this. You could by no means discover the amount of the damage you would do by such alteration.

"On similar grounds, your Lordships will give a very weighty consideration to a train of decisions in another part of the island. If a law might originally have admitted of two constructions, and if one of these constructions has been given to it, and this been followed by long usage, I am sure it is not the practice of those who administer justice in the *dernier resort* in this country to alter such usage.

"If this case had come here in 1707, soon after the act of Parliament then passed, there were many cogent reasons to be urged why the Lords of Session could not augment a stipend that had been modified under a former commission, much less a stipend that had been once augmented by themselves.

"I shall at present leave out of view a great deal of the argument that was urged at the bar, (though perhaps it was there properly urged), as to the consequences of a decision in one way or other. Every person must see, on the one hand, that if the Lords of Session have power to augment stipends from time to time, the heritors, if they do not suffer an injury, must suffer in the matter of expense, of vexation, and constant litigation, from which the Legislature might have relieved them. But the argument *ab inconvenienti* cannot be listened to at present. Here we do not sit as legislators.

"On the other hand, if the act of 1707 put it out of the power of the Lords of Session either to augment stipends, modified under former commissions, or to re-augment these stipends, it follows that the clergy of the Church of Scotland must remain unprovided with the

1808.

EARL OF
WEMYSS
v.
MACQUEEN,
&c.

1808.

EARL OF
WEMYSS
v.
MACQUEEN,
&c.

means of holding that rank in society which is useful and necessary for them, but which is much more useful to the laity.

“ If the argument *ab inconvenienti* does not satisfy your Lordships, it must not be resorted to on either side.

“ In this country, they went another way to work with regard to the London clergy. They had their stipends (as I may term) settled at certain rates in Charles the Second's time. When an act of Parliament was applied for to augment these in the reign of George II., though it was strongly represented that parties had acquired their properties under an understanding that their tithes having been commuted for a stipend, they were only liable in certain burdens yet the Parliament interfered to augment the livings of the London clergy.

“ This sort of general principle was also acknowledged by the Legislature in Scotland. It is impossible to look at the proceedings in 1617 and 1621, and not to perceive that the Legislature meant thereby to settle the terms of a legal contract, in which a certain stipend was to be settled for the minister, and the rest of the tithes secured to the possessors of them ever after.

“ But afterwards, when a new commission was granted in 1633 the commissioners had power to augment those stipends which amounted only to the minimum of the former acts, and the maximum was taken away.

“ I state this, to illustrate what I wish to throw out of view in this case, the degree of inconvenience on either side. In whatever way your Lordships may decide this cause, there must remain a measure of inconvenience, which it may be the interest of all parties to have put on a better footing by the Legislature.

“ I shall now state briefly the grounds upon which I conceive it would be contradictory to the usual rules for administering justice, and highly dangerous to reverse this judgment. I will not enter into the consideration of the fifty-three cases set out at the basis as second augmentations, prior to the Kirkden case. I shall suppose what I believe is contrary to the fact, that there were no cases, even of first augmentation, where a stipend had been previously modified prior to 1751, still the question is, What has been done since that period?

“ In cases where former commissions had fixed the stipends of clergymen, it appears to me that the Lords of Session had no more power to augment these once, than they had to augment them a second time. But I am free to say, that I can never assent to the thought it may have been laid down by great names in the Court of Session, that what they were in the daily habit of doing was a stretch of power.

“ There is no doubt that the present Court augmented once, where augmentations had been granted prior to 1707. If this be so, I do not want a case of second augmentation. Augmenting once demonstrated that the Court had the right to augment twice, or oftener.

As a lawyer, I am entitled to say, that every decision which proceeded on the same principle, was to be considered as one of a series of decisions.

"It is quite impossible to read the record in the Kirkden case, without seeing that the granting of one augmentation was the reason founded on why a second augmentation was refused. But the Court did not specify that, the stipend having been once modified, there was no power to augment it again. In Lord Thurlow's judgment upon this case, (I speak of this, not as embodied in the record, but as stated in the opinion said to be given by him), his Lordship directed the Court to inquire into the grounds upon which their refusal to augment was founded, whether as founded in law or discretion merely.

"Then the case of Tingwall came before the Court; and I see, from what is given us of the notes of the Judges' speeches in that case, that not one of the Judges denied that the Court had a power of augmenting. Some of them say nothing of it; but Lord Braxfield, (for whose memory I, with all others, entertain the highest respect), and Lord Eskgrove (then also a high character on the bench), both admit that a difficulty had arisen in their minds, from the Court having reviewed modifications granted by former commissions.

"I never heard, in the course of my professional life, of a series of judgments, on which so much is to be founded with regard to the law of the question at issue. In the Kirkden case, we see, that as strong an opinion as could be delivered in favour of the competency of a second augmentation, was given by the great lawyer who then presided in this House. Yet the lieges in Scotland agreed to try the question again; and all the Judges still agreed in opinion that they had no power to grant a second augmentation. This judgment was reversed; and it appears afterwards that not less than 800 cases of second and farther augmentations have occurred.

"These cases were not upon a point like the meaning of *heirs male*, or *heirs of the body*, which no person hears of, or knows distinctly, but the parties immediately interested. These decisions regarded the whole tithe law of Scotland. From the struggle which had occurred on this point, is it possible to believe that all these passed on amicable acquiescence? Must there not have been a persuasion that, if any one of these cases had been brought here on general grounds, it must have been decided, as I think this case must be decided?

"The noble Baron has said that no great inconvenience would ensue from reversing the judgment now under discussion; that such reversal would only operate upon other judgments pronounced within the last five years, and that the Legislature would interpose to quiet these matters. But, as a judge, I cannot speculate to-day upon what the Legislature may think proper to do on the morrow.

"If I were to stop here, without proceeding to controversy upon the meaning of the acts of Parliament, I conceive I might put down my foot, and say, that if the act 1707 will bear the

1808.

EARL OF
WEMYSS
V.
MACQUEEN,
&c.

1808.

KARL OF
WEMYSS
v.
MACQUEEN,
&c.

construction put upon it by the clergy, it ought to bear that construction. Lord Stanhope had put this construction upon it. Considering what has been done since that time, and how the law has been considered since 1757, can you reconcile it to yourselves to say, that all these proceedings have been founded in acquiescence merely? To say so much would be inconsistent with the safety of property and the interests of the country.

"But I beg leave to say, that if I had been called on to decide the question immediately after the act 1707 was passed, I am far from being clear that it would have been decided otherwise than it has recently been.

"The act of Parliament 1567, while it gave to the clergy a right to the *thirds* of all the benefices in the kingdom, declared the tithes to be their proper patrimony.

"No grant was made to a titular without the obligation of a maintenance to the minister. And when bishops were again established, the same obligation was imposed upon them. Thus a provision to the parochial clergy was inherent in the right to tithes.

"While the maintenance of the minister was thus an indefinite burden imposed upon the granter of tithes in Scotland, it must have been anomalous indeed, and unlike to any thing known of a similar nature in this country, if there was no court in Scotland that would have enforced this obligation, though this was argued at the bar.

"Then came the act of Parliament of 1617, by which certain commissioners were empowered to assign a perpetual local stipend to the minister. This stipend was no doubt meant to be incapable of increase; and, for this construction, there is both the express and the implied authority of the act. There is something in the act which appears to show the meaning of the word perpetual; for when it speaks of a stipend to be fixed by the commissioners, it calls it perpetual local stipend; but when it speaks of the minimum of 50 merks, or five chalders of grain, it calls this a local stipend, dropping the word 'perpetual.'

"In the act of 1621, the enactments are the same as in that of 1617; and I think it must be agreed, that, at this period, nothing could have given farther relief to the clergy but an act of the Legislature.

"Next came the act of Parliament 1633, which is to be construed along with the decrees arbitral of Charles I., which had been pronounced before this time. The general view of these was, that there should be a stipend for the ministers, that the heritor was to be empowered to buy his tithes at nine years' purchase; and that, after this, the heritor was to be entitled to the tithes in full property, and the minister confined to his stipend. It was a good deal discussed at the bar, if nine years' purchase was a fair and adequate price or not. I do not enter into this at present; the law writers, however, state this as a low price.

" This bargain was carried into effect by an act of Parliament. If it was the understanding of those who were parties to the decrees arbitral, that a stipend could never be augmented upon after the tithes were purchased, how is the act of Parliament in 1633 to be accounted for? Though the former acts of 1617 and 1621 stated that perpetual local stipends were to be fixed for the ministers, free from all claim of farther augmentation, it is to be observed that the act 1633 does not direct the commissioners to fix a *perpetual*, but a *constant* and local stipend. I do not think there is much in this; but learned men have argued upon it.

" This act of Parliament also gives the minimum; and it contains no clause, that purchasers of tithes should in all future times be free. If such had been meant, the prudence of the Scottish landholders would no doubt have obtained the creation of a similar clause to this effect, as was contained in the acts of 1617 and 1621.

" After this there was a great number of commissions; and I have mistaken the effect of them very much, if power was not granted by them to augment stipends which had been modified under former commissions. This was a Parliamentary declaration, that the titheholder was to be subject to farther augmentations.

" From what passed as to parochial tithes in 1690, it seems to be impossible to contend that, of these, there should be no augmentations and re-augmentations. The act concerning them was a sort of parliamentary commission, that might have granted augmentations at the time, and in future, as circumstances might require.

" Then, at the Union, came the act of 1707. Instead of a temporary commission, as the former ones had been, this constituted the Court of Session as a perpetual Commission of Teinds, with power to grant augmentations of ministers' stipends, &c.

" Lord Thurlow was undoubtedly of opinion that a power of re-augmentation was within the power of the Court. If the question had occurred before his Lordship in this House, soon after the act 1707 was passed, I think, if I had been counsel for the landlords, I might have raised doubts in his Lordship's mind. But now, in 1808, as I view the proceedings that have since taken place, I conceive that, on judicial principles, it is impossible to agree with the motion of the noble Baron. But I find it also impossible to agree with the terms of the interlocutor as it now stands.

" In the Kirkden case, it was stated by the appellants that there was a sort of Rule of Court, upon which the second augmentation had been refused. The opinion given thereon was as I have stated it to be, but the opinion was not embodied in the judgment. The judgment was upon that principle that I think you would act on now, if matters had been as they were then.

" That judgment appears to direct the Court to look to and see what was contained in the act 1707, that the Rule of Court was nothing; but that it was necessary to consider and declare the law, as

1808.

EARL OF
WEMYSS
V.
MACQUEEN,
&c.

1808.
 ———
 EARL OF
 WEMYSS
 v.
 MACQUEEN,
 &c.

it was contained in the act of Parliament. I do not think, therefore, that the judgment in the Kirkden case went far in the way of precedent.

“ The decision of the House in the subsequent Tingwall case, appears to have gone a great deal farther. The interlocutors, in the general point of law, were reversed; Lord Thurlow thought the judgment therein wrong, and sent it back to be considered in the special circumstances, (which I do not well understand), and to see if the clergyman had not right to the *ipsa corpora* of the tithes.

“ But even supposing both these judgments had proceeded on the general question, I should have been sorry that the decision, in the present case, had rested upon these. I consider, however, that the series of decisions given, since the act of 1707 was passed, are sufficient to support the principle of the present judgment.

“ While I must, therefore, offer my negative to the motion of the noble Baron, I must still move for an alteration of the interlocutor, conceiving that it expressed a good deal more than is necessary to sustain it; and that, if it was affirmed as it stood, a record would be framed which I doubt if there be grounds to support.”

Here his Lordship concluded with his motion.

Ordered and adjudged, that the interlocutor complained of in the said appeal be varied as follows:—After the words (find that), the following words be inserted (it is within the legal powers of); and that after the words (this Court), the following words be left out (having been established by an act in the year 1707 a permanent court of commission, in place of the former temporary commissions, for the purpose, *in alia*, of modifying and augmenting the stipends of parochial ministers out of the teinds, it is the duty of the Court, and within its powers, as recognized by the House of Lords, in two decided cases, in the years 1771 and 1789, and by the uniform practice of the Court acquiesced in by all parties in a great variety of instances, ever since the last mentioned period); and that after the words (to receive) the word (such) be left out; and after the word (applications) the following words be inserted, (for modifying and augmenting the stipends of parochial ministers out of the teinds); and that after the words (former augmentation), the following words be left out (since the institution of the Court; and, therefore, that the present case must be allowed to proceed as usual); and that the words (made since the year 1707), be inserted. And it is hereby ordered and adjudged, That with these vari-

tions the said interlocutor be, and the same is hereby affirmed. And it is further ordered, That the cause be remitted back to the said Lords of Session to proceed as is just.

For the Appellant, *Wm. Adam, Henry Erskine, Ad. Gillies, Geo. Cranstoun, F. Horner.*

For the Respondent, *David Boyle, John Connell.*

NOTE.—This and other cases led to the act 48 Geo. III. c. 138, by which the law on the subject of augmentations is now regulated.

1808.

EARL OF
WEMYSS
v.
CARRE.

The EARL OF WEMYSS, *Appellant ;*
ALEXANDER CARRE, ESQ., *Respondent.*

House of Lords, 24th May 1808.

BILL—PAYMENT—ACQUIESCENCE.—Circumstances in which it was held, that a bill granted by a party for £500, and which bore, by relative letter, to be granted in order to be discounted for his accommodation, was not due as a debt against that party, it appearing that he had expended the £500 in serving the appellant's political interests, and those of his family, this being supported by acquiescence, no claim having been made upon the bill for six years after it fell due, and after the death of that party.

The respondent's brother possessing great political influence in the burgh of Jedburgh, &c., had exerted it on several occasions in securing the election of the appellant and his family for the burghs of Haddington, Jedburgh, &c. That influence had been influential in securing the return of Lord Elcho his son in 1780. In consequence of serving the appellant's family in their political interests, he had involved himself in pecuniary embarrassments.

He died in 1798, and, in consequence of these embarrassments, the respondent had to serve heir *cum beneficio inventarii* to his brother in 1799. Soon thereafter the appellant brought the present action against the respondent, concluding for payment of the sum of £500, said to have been advanced by him to the late Mr. Carre fifteen years before, conform to bill dated 31st Jan. 1784, drawn by Mr. Carre on the appellant, accepted by him, and discounted at the banking house of Sir William Forbes and Co. in Edin-

1808.

EARL OF
WEMYSS
F.
CARRE.

burgh, by James Stormonth, writer in Edinburgh, the appellant's political agent. Applicable to this bill, there was the following letter granted by Mr. J. Carre :

" Sir,

Edinburgh, 31st Jan. 1784

" As you have, of this date, accepted a bill
" drawn by me upon you for £500 Sterling, payable six
" months after date, *without any value*, being for the purpose
" of discounting *for my own accommodation*. Therefore I hereby engage to take up said bill when due, and
" deliver it to you, to cancel your subscription therefrom, and
" to free and relieve you of all consequences thereof.—I am,
" Sir, Yours, J. CARRE."

From various circumstances, in particular, from the force of the bill, in which the appellant appeared as debtor, and from the fact that there existed no other than a political connection between them, and also from the application of the proceeds of the discount of this bill,—the inference was that the transaction had been gone into to forward the political views of the appellant. And this conclusion was strengthened by the circumstance of no judicial claim having been made against Mr. Carre till nearly six years after the date of the bill; while, four years after its date, he had written to the late Mr. Carre the following letter, which is quite inconsistent with the supposition that such debt was due.

" Dear Sir,

Retreat, 8th Sept. 1784

" I have just now an express from Mr. Stormonth
" along with which he sends me your letter of the 4th inst.
" him, *I here enclose you £200, which you will please employ where you think it proper for our interest*; and
" you have, in so uncommonly and friendly a manner, taken
" us by the hand in our business in your part of the country,
" try, may I hope you will still continue to give us your
" advice and support in this affair. *I want words to express the obligations we are under to you.*—I have the honour to
" be, dear Sir, your much obliged, and most humble servant

FRANCIS CHARTERIS."

The whole money, for securing the son's election, came through the Earl. Mr. Charteris was curtailed in his income, and had little or nothing to give, and had frequently written Mr. Carre, as was shown by letters produced, and

pressing his regret at not being able to send him money, having none of his own.

It was in these circumstances, and in the beginning of the year 1784, when it was necessary to support the interest of appellant's family, that the sum of £500 was raised by the bill above mentioned, in order to supply some urgent demands of the town council of Jedburgh, and defray some law proceedings attendant on the election matters.

A letter before this bill was concocted, and a letter after it was cashed, demonstrated that it was to serve the political purposes of the Earl's son. On 5th February 1784, after its date, Lord Elcho writes from London, stating, "It is so far lucky, as, from a letter I got from Mr. Stormonth last night, I find you are more at your ease than you was when you wrote to me; whatever my father and Mr. Stormonth approve of as a proper plan to be pursued, will be agreeable to me."

It was also proved that Mr. Carre sent £300 of this sum to the treasurer of the town council of Jedburgh, to be distributed to the several trades, and that £153. 11s. 9½d. was paid to a writer in Jedburgh for political expenses—the balance went to discharge other disbursements. When a demand too was made for the bill, he wrote the Earl, stating these facts, and, in answer, received a letter from Mr. Anderson, written on 4th February 1791, by the instructions of the appellant, admitting that the money had been expended in serving his political interests, and holding out a promise that, if Lord Elcho did not pay, that he would not allow him to be the sufferer. Accordingly, the respondent lodged defences setting forth these facts.

The Lords, after several interlocutors, varying in the judgment come to, finally sustained the defences, and assoilzied the defender, and found the appellant liable in expenses. Feb. 20, 1804.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded by the Appellant.—The obligation which the late Mr. Carre came under, by his letter above quoted, in regard to this bill, to retire it when it fell due, is perfectly clear; and there is no evidence whatever of any private understanding inconsistent with, or contradictory to, the terms of that obligation. On the contrary, the whole evidence proves the reverse. When the bill falls due, it is allowed to lie over at his request. At a distance of four years he pledges himself to the bankers that he would soon discharge

1808.

EARL OF
WEMYSS
v.
CARRE.

1808.
 EARL OF
 WEMYSS
 v.
 CARRE.

the bill in whole or in part. And when, finally, it was paid by the appellant, and demand made upon him for payment his language is not that of a person who had any ground in law or equity to resist the demand, or who had a pretence for saying that the appellant was even in honour bound to abstain. He pleads his services, and throws himself entirely on the appellant's generosity, alleging that he had spent the money in supporting Lord Elcho's interest in Jedburgh. But, supposing this latter explanation to be proved, which it is not, he has produced no authority from the appellant for the expenditure. And the whole correspondence and circumstances are confirmatory of the debt, supported by the bill and relative letter. Nor is it any answer to this object, that the letter, or obligatory writing, is improbable and ineffectual, not being written by, or holograph of Mr. Carre, and no witnesses having testified his signature; because it is obvious that such objection is elided by the fact that it is a document to which law gives the general name of *res mercatoria*. And even if the document were not of privileged nature, still this objection would be completely done away both *rei interventu* and by homologation.

Pleaded for the Respondent.—The appellant, from the beginning, was aware that the £500 raised by the bill was not really intended for Mr. Carre's individual and private accommodation, but to be applied for political purposes to the burgh of Jedburgh, in which the appellant and his father were jointly engaged; and that the missive granted by Mr. Carre was merely intended as a means of calling him to account for the expenditure of the money, which the appellant has acknowledged he was convinced had been expended by Mr. Carre in supporting the interest of Lord Elcho, which is identified with his own. In the letter written by Mr. Anderson, 4th Feb. 1791, by the desire of, and afterwards homologated by the appellant, he enters into an express obligation, in case Lord Elcho should, on application to him refuse to do Mr. Carre justice, to relieve him of the debt. Application was made to Lord Elcho by Mr. Stormonth, and his Lordship refused to do Mr. Carre justice, not because he was unwilling, but because he was unable. The condition under which the appellant came under the obligation to relieve Mr. Carre being fulfilled, the appellant is now bound to implement the obligation.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

1808.

“ My Lords,

EARL OF
WEMYSS
v.
CARRE.

“ It may be proper to mention why we have paused so long to give judgment in this case. There were two contradictory judgments in the Court below. The Court at one time were of opinion that the action could be sustained ; and, finally, that it could not ; and, in the course of procedure, individual judges changed their opinions.

“ The cause was ably argued at your Lordships’ bar ; and we were exposed to some risk of trying the question more by an individual than by our judicial feelings. The whole matter at issue was only £500 ; and, if we affirmed the decision, we must either give costs, or see a reason why they were not to be given.

“ The action arose in consequence of the following transaction :— In 1784 there was occasion to borrow £500, to be applied to election purposes at Jedburgh. A bill of exchange for this sum was drawn by Mr. Carre upon the Earl of Wemyss, which he accepted, and Mr. Carre then signed an acknowledgment, of the following terms. (Here his Lordship read the missive of 31st Jan. 1784).

“ It was argued, and, I think, on sound principles, that if it consisted with the knowledge of the Earl of Wemyss that the money was to be applied for election purposes for himself or his family, no action would lie on this matter against Mr. Carre.

“ From the best consideration I can give to all the transactions, as appearing from the correspondence, it appears to me that there is a considerable degree of evidence, if not satisfactory evidence, that the money was immediately applied to such election purposes. The meaning of the counter argument appears also to have been, that the money was to be repaid, if recovered out of some funds expected to be effectual in Jedburgh.

“ The only question was, if this source of payment failed, whether the money was to be paid from the private funds of Mr. Carre ? The natural course, in this view of the matter, would have been, that a demand should have been made on Mr. Carre for repayment when the bill became due, and was taken up by the Earl of Wemyss.

“ But, in point of fact, nothing appears to have been said of this demand from 1784 down to 1790. At this period an assignment was taken in the name of a third person, and an action brought against Mr. Carre.

“ The question comes to be, if, on the acquiescence from 1784, and the evidence furnished by the letter of Mr. Anderson, Lord Wemyss’ agent, it is or is not to be presumed that his Lordship knew that the money was applied for these election purposes ?

“ I have had considerable doubts as to this, but I incline to think that his Lordship was aware of this. I therefore cannot advise your Lordships to reverse the judgment ; but, on account of the varying

1808. judgments in the Court below, and the difficulty of the case itself, I cannot advise your Lordships to give costs."
 ———
 DUKE OF HAMILTON
 v.
 SCOTT.

On his Lordship's motion the judgment was affirmed.

It was, therefore,
 Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Wm. Adam, Thos. Thomson, F. Horner*

For the Respondent, *A. Colquhoun, Sir Sam. Romilly.*

NOTE.—Unreported in the Court of Session.

ARCHIBALD, DUKE OF HAMILTON & BRANDON, *Appellant* =
 Rev. JOHN SCOTT, Minister of the Parish of } *Respondent*
 Avondale, }

House of Lords, 30th May 1808.

AUGMENTATION OF STIPEND—JURISDICTION OF COURT OF TEINDS—

Held that the minister was entitled to a second augmentation of stipend; and the Court, as a Commission of Teinds, had power to grant such.

This case involves precisely the same question of law raised and decided in the Prestonkirk case, p. 210.

The facts here were, That the respondent obtained a decree of augmentation of his stipend in July 1786, where the stipend, computing meal and barley, at the increase of still moderate rate, of £1 per boll, was brought up to £151.

In 1804 he brought a second process of augmentation. Whereupon the appellant stated the same objections to the want of power in the Court, as a Commission of Teinds, to grant such augmentation, precisely as argued in the Prestonkirk case.

Feb. 26, 1806. The Court pronounced this decree: "Having advised the scheme of the rental, and prepared state, and being satisfied therewith, and with the usual steps of procedure in this process, well and ripely advised, they modify, decern,

“ and ordain the constant stipend and provision of the kirk of
 “ Avondale, to have been, for the crop and year of God
 “ 1803 yearly, since syne and in time coming, six chalders
 “ meal, four chalders of barley, payable in money, accord-
 “ ing to the highest fiar prices of the county, and £50 ster-
 “ ling money for stipend, with £8. 6s. 8d. money foresaid,
 “ including therein £5 sterling mortified by Anne, Duchess
 “ of Hamilton, for furnishing the communion elements; and
 “ decern and ordain the same to be yearly paid to the pur-
 “ suer, and his successors in office, ministers serving the cure
 “ of the said kirk and parish, by the titulars and tacksmen
 “ of the teinds, heritors and possessors of the lands and
 “ others, intromitters with the rents and teinds of the said
 “ parish,” &c. By this decree the total stipend was made
 to amount to £258 per annum, exclusive of manse and
 glebe.

1808.

DUKE OF
 HAMILTON
 v.
 SCOTT.

Besides, pending these proceedings, a locality of the sti-
 pend was going on ever since 1787, in which, of this date, Feb. 27, 1805.
 the minister obtained an interim decree.

The appellant brought a suspension of the above decree
 of augmentation, which, after full consideration, the Court
 refused.

July 2, 1806.

Against this interlocutor the present appeal was brought.
 While a cross appeal was also brought by the respondent
 against the rule of augmentation allowed by the Court in
 the *second* decree of augmentation.

After hearing counsel deliver the same argument as in the
 Prestonkirk case,

It was ordered and adjudged that the appeal be dismiss-
 ed, and that the interlocutors complained of be, and the
 same are hereby affirmed.

For Appellant, *A. Colquhoun, Wm. Adam.*

For Respondent, *Wm. Alexander, Sir Sam. Romilly.*

NOTE.—Unreported in the Court of Session.

1808.

[Fac. Coll. vol. xiv. p. 90.]

FORBES, &c.
v.
HONYMAN, &c.

WM. FORBES of Callender, Esq., and ROBERT
FORBES of Castleton, } *Appellants;*

SIR WM. HONYMAN of Armadale, Bart., one
of the Senators of the College of Justice,
Sir JOHN DALRYMPLE HAY, Bart., &c., } *Respondents.*
Trustees appointed by John, Earl of
Galloway,

House of Lords, 31st May 1808.

TRUST—SALE—TITLE—TRUSTEES—QUORUM—SINE QUA NON.—~~E~~
tates were bought by the appellant, which belonged to the Earl of Galloway, and were sold by his trustees. In the Earl's trust-deed, ~~W~~ conveyed his estates to certain trustees named, including his Countess as one, 'or such of them as should accept,' providing that a majority should be a *quorum*, and that the Countess should be 'one of the *quorum* and *sine qua non*.' Four out of nine trustees only accepted, and the Countess was one who did not accept. The purchaser therefore objected to the disposition granted by these trustees; alleging that, as the *sine qua non* had not accepted, the trust was gone. Held the disposition as so granted good and unexceptionable, it being granted by all those who had accepted, and the Countess and her son having signed the disposition as consenters.

Lands, consisting of several baronies, belonging to the Earl of Galloway, were sold in lots by public auction. The articles of roup bore: "That the trustees should be bound and obliged to grant and subscribe formal and valid dispositions of the foresaid lands and others, in favour of the pursuers, and their heirs and assignees."

The appellant, William Forbes, purchased several lots, at the price of £22,320, for which he, and the other appellant as his surety, granted their bond, in terms of the articles of roup, to pay the price, one half at Martinmas, and the other half at Whitsunday 1808, to bear interest at five per cent; but under condition of receiving an unchallengeable title.

A day after the sale, and in order to get quit of the obligation to pay interest on the price at five per cent., he offered immediate payment, on receiving a valid disposition. But, on investigating the title, it occurred to the appellants that the disposition offered was not valid.

The whole estate, including that sold, was left under

trust, to trustees specially named in the trust deed, of whom there were ten names, including therein the Countess of Galloway, his widow. The acceptors or acceptor, survivors or survivor, were empowered to act. Power was also given to assume others; and the deed further declared the "majority of said accepting trustees shall be a quorum;" "providing always that the said Anne, Countess of Galloway, my beloved wife, shall be one of the said quorum and *sine qua non*."

1808.

FORBES, &c.

HONYMAN, &c.

Of the ten trustees, one predeceased the Earl, and of the remaining nine, only four accepted the office. The Countess of Galloway was among the number of those who did not accept. Without this *sine qua non*, it was maintained the trustees' powers were at an end. But the disposition tendered to the purchaser was signed by those four trustees, and also by the Countess dowager of Galloway, and her son, the present Earl, as *consenters merely*. Yet the appellants, apprehending the title as defective, brought a bill of suspension, stating the case, which was followed by answers and replies. Lord Hermand reported the case to the whole Court, which instructed him finally to refuse the bill. And on reclaiming petition, the Court adhered.*

Dec. 12, 1807.

Feb. 3, 1808.

* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said :—" Upon a very strict and literal construction, there is room for doubt here; but I am clear that the Earl, in making this trust, did not trust to her alone. The case of natural death is specially mentioned as the case chiefly in view, but, suppose she was civilly dead *quondam* this deed, by marrying another husband, or by forfeiture, non-acceptance, &c., what then? In my opinion, there should be evidence that Lady Galloway refuses to accept. The title must either be in the accepting trustees, or the trust has fallen; and it is in the present Earl of Galloway, who is heir of line, heir male, heir of tailzie and provision to his father; and both titles are founded on. The lands in question are not tailzied, but, on the contrary, are allowed to be sold. I therefore think the interlocutor clearly right. The case of Lord Drummorie, &c. v. Somervail, reported by Lord Kilkerran, 24th Feb. 1742, ('Tutor and Curator,' No. vi.) I think decisive.

"The Court were of opinion, that if the Countess Dowager had accepted, her consent as a *sine qua non* would have been necessary to validate all the proceedings under the trust deeds; but, by the terms and conception of the deed, it did not appear to have been the intention of the granter that her non-acceptance should dissolve the trust; and even if it had, the title would then have been in the present Earl, who concurs in the sale."—Fac. Coll.

1808.

Against these interlocutors the present appeal was brought to the House of Lords.

FORBES, &c.

Pleaded for the Appellants.—As the said trust-deed provides that the said Anne, Countess of Galloway, shall be *sine qua non* in the quorum of trustees appointed to act, her refusal to accept, the whole machinery of the trust failed and became ineffectual. The existence and constitution of the trust is made thus to depend absolutely on the circumstance of the Countess of Galloway accepting, but she having declined as a trustee, and it not being declared, that if the Countess should not accept of the trust, a majority of the remaining trustees should be authorized to carry it into execution, the whole trust falls to the ground. If it had been so declared, then the four acting trustees might have been entitled to make an effectual sale of the property, but the very reverse of this is said: for there is a precise unambiguous declaration that the Countess dowager should always be one of the quorum, and *sine qua non*; or, in other words, that there could be no legal quorum without her. Mr. Erskine, in his Institutes, in speaking of tutors, says that “non-acceptance or death, or supervening incapacity of a tutor or curator *sine qua non*, hath necessarily the same effect, for without a *sine qua non* no act of administration is valid, which rule holds in the nomination of tutors by a father, in which he has fixed a certain number for a quorum, though there should be as many tutors left alive, after the supervening incapacity of a *sine qua non* as constituted a quorum.”

Erk. B. 2, tit. 7, § 30.

Pleaded for the Respondents.—The conveyance being made to the persons therein named, or *such of them as shall accept*, no right can vest but in those who do accept. Therefore as to those who did not accept, their interest is precisely the same as if their names were not in the deed. The Countess of Galloway was one of those who did not accept, therefore her interest ceased, and, along with her non-acceptance fell also the condition of her being one of the quorum, and a *sine qua non* of that quorum of accepting trustees. Of course, if she did not accept, she could not be of the quorum, far less a *sine qua non* of that quorum. But the consequence of her non-acceptance did not make the trust deed to fall otherwise. It remained good to those remaining trustees who accepted; and the obvious meaning of the deed was, that the Countess should be a *sine qua non* if she accepted of the trust. Besides, the consent of the Countess

and of her son, the present Earl, ought to remove all possible objections.

1808.

After hearing counsel, it was

SMITH, &C.

Ordered and adjudged that the appeal be dismissed, and that the interlocutors be, and the same are hereby affirmed, with £50 costs.

v.
ALLAN, &C.

For Appellants, *Wm. Alexander, Ad. Gillies.*

For Respondents, *Ar. Colquhoun, Sir Sam. Romilly.*

JAMES SMITH, Merchant in Leith, and ALEX. }
M'CAUL, ALEX. STEWART, and WILLIAM } *Appellants;*
M'NEIL, Merchants in Glasgow, . }
ALEXANDER ALLAN, Merchant in Glasgow, }
ANDREW TEMPLETON, Merchant there, } *Respondents.*
Trustee on his Sequestered Estate, }

House of Lords, 21st June 1808.

INSURANCE—CONCEALMENT—SUBMISSION—PERSONALIS EXCEPTIO.

—In the insurance of a ship and cargo, the underwriters refused to pay, on the ground of concealment of circumstances. Held, that the circumstances were not such in their nature as to affect the validity of the policy, and not such as they were bound to communicate.

The ship *Bellona*, a letter of marque, belonging to the respondent, and commanded by Captain M'Gruer, cut out of the Bay of Campeachy, in the Gulf of Mexico, a Spanish ship laden with logwood. The ship papers were not on board at the time of capture, so that there were no legal means of *ascertaining her name*.

Upon the following letters of advice from the captain, an insurance was effected by the respondents. On the 19th November 1798, they received a letter, dated 18th Sept. preceding, from Captain M'Gruer, and which enclosed copy of one sent by him previously, dated 10th September, as follows:—

“ Ship *Bellona*, Charleston, 10th Sept. 1798.

“ Alexander Allan, Esq.

“ Dear Sir,

“ I did myself the pleasure of writing to you 26th ult.,

1808. " to which refer; a copy of which I now enclose, and since
 SMITH, & C. " the ship's repairs have gone on very slowly. This plac
 " is for no despatch in the shipping line, as I expected
 ALLAN, & C. " *When I wrote you last*, I expected to be clear by thi
 " time, and now am much afraid will not be able to sail be
 " fore the 20th instant.

" I have now made up my mind fully to send the Spania
 " prize ship home to you, as am fully convinced her carg
 " will sell much better in Glasgow than in Kingston, bein
 " the best logwood, as the price current will appear. Th
 " quantity on board, as I can find by the Spanish captair
 " is 225 tons, but 250 to 260 tons. And the ship I expec
 " will sell, say for £1000, and tanned leather to the amoun
 " of £200 sterling more or less. From this statement yo
 " will be able to make insurance upon the ship and cargo, a
 " you will think best. I have called her the Kingston, as n
 " papers were found on board when cut out of Campeach
 " She is a stout able ship, about four years old, mountir
 " two four pounders, and shows six carriage guns, and sa
 " as well as the common run of merchant ships. I shall s.
 " her properly fitted for the intended passage, that nothin
 " will be wanted, and intend to see her clear off this coa
 " say 100 leagues. I will give the command of her to A
 " Alexander Thomson, my present chief officer, who is w
 " known in Greenock. I have agreed to pay him £100
 " carrying the ship home, which you will please attend
 " as Mr. Thomson is to give his full attendance to the s
 " ship till disposed of, which you will get done as soon
 " possible, as there must be a form of sale for the benefit
 " the capturers; and you may look for the Kingston abo
 " the 10th Nov. or earlier."

The letter in which the above duplicate was enclosed wa
 in the following terms:

" Ship Bellona, Charleston, 18th Sept. 1798.

" Dear Sir,

" Enclosed is a copy of my letter to you, dated 10th
 " instant. I have little more to add at present, *but wil*
 " *write you more fully* in a few days, how soon it is in m
 " power to collect all the ship's accounts in, which expec
 " will be the 21st inst. I embrace this opportunity by
 " vessel bound to Falmouth."

His next letter announced that he had drawn bills fo
 £1645. 17s. 8d. Sterling, in favour of Messrs. Canty, Henr.

and Co., on account of their advances for the ships *Bellona* and *Kingston*. And, of same date, Messrs. Canty, Henry, and Co. wrote the respondents:—"We have now the pleasure to advise that the *Bellona* and her prize are both ready for sea. It has been a matter of great regret with us that they have been so long delayed; but the circumstances in which they were placed, by the desertion of most of their crew, made it unavoidable; and the length of time taken up and wasted in the numerous suits instituted against the ships and captain is inconceivable." And, of this date, Oct. 4, 1798. the captain wrote: "Dear Sir, I have now, at three different times before this date, wrote you fully of my intention in sending the ship *Kingston* to you to Glasgow, which now is the case; and if, unfortunately, all my former letters do not arrive safe, upon receipt of this please get insurance made upon the above ship *Kingston* and her cargo, being Campeachy logwood, say 225 to 260 tons, and tanned leather, say £200 worth. I forward this by way of New York; have not copied these few lines. The *Kingston* is staunch and strong, well fitted, and manned completely, and shows six carriage guns, but only two of which is metal. Waiting for a wind to carry both ships over the bar, and the pilot on board—I remain," &c.

1808.
SMITH, &c.
v.
ALLAN, &c.
Oct. 2, 1798.

Of this date, Messrs. Canty, Henry, and Co. wrote:—"We have now the satisfaction to advise that both she and the *Bellona* passed our bar yesterday."

The vessels sailed accordingly—the *Bellona* accompanied the *Kingston* for six days, till 11th October, when, judging her safe from capture, she made for Jamaica, and left the *Kingston* to pursue her voyage to the Clyde. The *Kingston*, however, was never again heard of; and it was supposed that she had foundered at sea, and that all on board had perished.

Meantime, on the receipt of the above letters, an insurance was effected with the appellants for £700; and with other offices to the extent of £5500 on the ship and cargo. The value of ship and cargo was £11,000. All the offices paid the amount insured except the appellants; and action was brought against them for payment, the appellants resisting, on the ground, that what they considered a material circumstance, namely, that part of Captain M'Gruer's letter which

1808. stated his *expectations* when it was likely the vessel would arrive in the Clyde (10th Nov.) was concealed. But, before action was raised, a reference had been made of the matter to Messrs. Denniston and Finlayson, who gave it as their opinion, after investigation, that they saw no ground for imputing undue concealment to Mr. Allan, and the whole underwriters, who subscribed this reference with the appellants, acquiesced, with the exception of the appellants.

Oct. 2, 1802. Action was then brought before the Admiralty Court, and the Judge Admiral found:—"It admitted and proven that the letter 10th Sept. 1798, or at least that part of which related to the time when the ship in question might be expected in Clyde, was communicated to the reference Messrs. Denniston and Finlayson, before they signed their agreement of 10th Oct. 1799; Find it admitted that the letter of reference to Messrs. Denniston and Finlayson was duly signed by or for the defenders, Messrs. James Smith, Charles Freebairn, Robert McCaul, and Alexander Stewart; Find that, in consequence of this reference these four defenders were barred *personali exceptio* from founding on the circumstance of alleged concealment; further, find that the insured was not bound to communicate the information alleged to have been withheld, and that the alleged concealment was not of such nature as to affect the validity of the policy; repelled the other defences; Find the defenders liable each respectively for the sums concluded for."

An action of reduction was brought of this decree.

June 25, 1803. The Lords sustained the defences, repelled the reasons of reduction, except as to giving expenses, the defences at that point being sustained. And, on reclaiming petition Dec. 16, 1803. the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—1. The reference to Messrs. Denniston and Finlayson did not bar the present action because that transaction was, in its nature, neither a reference, in the proper sense of that term, nor a submission. It was nothing more than a request to these gentlemen to investigate the transaction. But even if it were a submission, it could not bind Mr. Allan, as it is not mutually binding, nor meant to be so. It is not an award. It is a re-

note issued indicating an opinion, which the appellants bound themselves in no shape to adhere to. 2. There was concealment of the time when it was expressed the ship would arrive. A date was given for her probable arrival, when all who know the usual time occupied in such a voyage must have taken the ship to be a missing ship; and, therefore, it was a material circumstance, which being concealed, annulled the policy.

1808.

SMITH, &c.
v.
ALLAN, &c.

Pleaded for the Respondents.—1. The appellants are barred *personali exceptione* by the reference made to Messrs. Denniston and Finlayson, which they signed, from insisting in the present action. 2. The duty of the insured is only to disclose material facts, known and stated to him, which may affect the risk. He is not bound to reveal mere conjectures, expectations, and hopes of the captain. And all that the appellants complain of here as being concealed, is the hope or expectation of the captain that the vessel would arrive in Clyde on 10th November. But, as Lord Mansfield decided in *Barber v. Fletcher*, (Doug. Rep. vol. i. p. 305), “It was only an expectation, and the underwriters did not inquire into the ground of the expectation.” The fullest explanation has been afforded, not only to show how erroneous this expectation was, but also to satisfy that no undue concealment existed.

Doug. Rep.
vol. i. p. 305.

After hearing counsel, it was

Ordered and adjudged as follows: find, That it is immaterial to consider, in this case, whether the defenders were barred *personali exceptione* from founding on the alleged concealment; and that, without regard to that consideration, the judgment of the Court of Session ought to be affirmed: And it is therefore ordered and adjudged, That the said appeal be dismissed, and that the interlocutors complained of be, and the same are hereby affirmed with £50 of costs.

For Appellants, *Samuel Marshall, M. Nolan, Geo. Jos. Bell.*

For Respondents, *J. A. Park, John Greenshields.*

NOTE.—Unreported in the Court of Session.

<p>1808.</p> <hr style="width: 50px; margin: 5px 0;"/> <p>BALDERSTONE, &c. v. HAMILTON.</p>	<p>DAVID BALDERSTONE, now of Avontoun, eldest Son and heir of the deceased Alexander Balderstone, Esq., and GEORGE NAPIER, Solicitor in Edinburgh, his Fac- tor <i>loco tutoris</i>,</p> <p>WM. HAMILTON, Esq. of Westport,</p>	<p>} <i>Appellants</i></p> <p>} <i>Respondent</i></p>
---	---	---

House of Lords, 27th June 1808.

FEU—LEASE—CLAUSE.—Circumstances in which, by the terms :
nature of a lease of land for 38 years, declaring ‘ that whate
‘ house or houses the said tenant shall build on said lands or
‘ dens made, they are to pay twenty-shillings per acre of ye
‘ feu-duty, the same to commence at the expiration of the te
‘ and to have a right of feu accordingly,’ was to be held as a feu
lease, entitling the tenant not only to build houses and gard
but also to grant feus of the land for these purposes.

May 9, 1765. The appellant's father, of this date, let in lease to Jo
Craig, at that time proprietor of a bleachfield in the vicini
certain lands, consisting of about twenty acres, belonging
him, for the period of thirty-eight years, at the rent of :
Sterling for the first year, and £10 Sterling for each
the succeeding years. The tack was conceived in the
terms, to John Craig, “ his heirs, executors, or assigne
“ all and hail that part and portion of land called Just
“ haugh, and the houses therein, and that as the same
“ particularly possessed by Alexander Inglis, tenant in L
“ lithgow Bridge, together with that part and portion
“ said lands bounded by Sir William Hamilton's lands, a
“ Robert Mochrie's possession, gardener in Linlithgow, up
“ the east ; the King's highway, and part of the said Al
“ ander Inglis' possession upon the south ; the road leadi
“ from Borrowstounness to Bathgate on the west ; and Al
“ ander Gray's possession, tenant in said Justinhaugh, on t
“ north parts ; and that as the same is presently possessed
“ the said David Balderstone, all lying within the parish a
“ sheriffdom of Linlithgow.” In this tack there is the f
lowing clause, “ And whatever house or houses the s
“ tenant aforesaid shall build on said lands, or gard
“ make thereon, they are to pay for whatever ground
“ same shall take up, to their said master or his forebears,
“ the rate of 20s. money foresaid per acre, of yearly f
“ duty, and the same to commence at the expiration of
“ tack, and to have a right of feu accordingly ; and the

“ tenant and foresaids, during the period of this lease, are
 “ to have the use and privilege of the springs from said
 “ Alexander Gray’s possession to Linlithgow Bleachfield.”

1808.

BALDERSTONE,
 &c.
 v.
 HAMILTON.

An obligation was said to have been obtained thereafter
 from the appellant’s father, explanatory of the above tack,
 in the following terms; but the original was never produced,
 “ That in and by the said tack, and communings there-
 “ anent, it was *really intended*, at the expiration thereof, and
 “ upon the said John Craig’s fulfilling the obligations there-
 “ by incumbent upon him, the said David Balderstone and his
 “ foresaids should be bound to grant, subscribe, and deliver
 “ to him and his foresaids, a valid, formal, and sufficient
 “ feu right to such part of the subjects thereby let, upon
 “ which he or they should build a house or houses, or make
 “ into gardens, to be holden of and under the said David
 “ Balderstone, and his heirs and successors, in feu farm, for
 “ payment of 20s. sterling of feu-duty for each acre thereof,
 “ and the said feu-right to commence at the expiration of
 “ the said tack; and that the said John Craig was desirous
 “ of being more fully secured thereanent, which the said
 “ David Balderstone was willing to do; therefore the said
 “ David Balderstone thereby bound and obliged himself, his
 “ heirs or assignees, duly and validly to infeft the said John
 “ Craig, or his heirs and assignees, in all and whole, &c. the
 “ lands and others contained in the said lease; and that in
 “ security to the said John Craig and his foresaids, that, at or
 “ before the term of Martinmas 1803, when the aforesaid tack
 “ expires in part, and upon the said John Craig and his fore-
 “ saids, their having fulfilled the obligations incumbent upon
 “ him by the said tack, the said David Balderstone and his
 “ foresaids shall grant, subscribe, and deliver to the said John
 “ Craig, or his foresaids, a valid, formal, and sufficient feu-right
 “ of such part of the lands above mentioned, upon which the
 “ said John Craig, or his foresaids, have built a house or
 “ houses, or shall have made into gardens, in terms of the
 “ foresaid tack, with the use and privilege of the springs,
 “ and the run of the springs from the said Alexander Gray’s
 “ possession to Linlithgow Bleachfield, to be holden of and
 “ under the said David Balderstone, and his foresaids, in
 “ feu-farm fee and heritage for ever, for payment of 20s.
 “ sterling, at two terms in the year, Whitsunday and Mar-
 “ tinmas, for each acre of the lands upon which the said
 “ John Craig, or his foresaids, have built a house or houses,
 “ or shall have made into gardens as aforesaid, and doubling

1808. " the said feu-duty at the entry of every heir, as use is, and
 " which feu-right shall also contain a clause of absolute
 BALDERSTONE, " warrandice and other usual clauses." In virtue of a pr
 &c. cept of sasine contained in this obligation, Craig was infe
 v. and this infestment recorded.
 HAMILTON.
 Dec. 17, 1767. John Craig thereafter became bankrupt; and the lease
 Dec. 24, — together with his other property, having been exposed
 public sale, was bought by the respondent in 1783.

Neither John Craig nor his creditors ever built any house
 or made any gardens upon these lands, nor did the re-
 spondent attempt to do so for fifteen years, until within
 four years of the expiry of the lease, when he began to
 grant feu-charters for building to a variety of persons, as
 he had been already the absolute proprietor, and thereafter
 to lay down whole fields in the temporary form of garden
 for the express purpose of demanding a perpetual feu-right
 to them at the end of the lease, for the rent of 20s. each
 acre.

On this being attempted, the appellant brought a suspension
 and interdict, and also declarator, to have the matter
 of right settled in Court. Interdict was granted *ad interim*
 and the bill passed to try the question; and, after the sus-
 pension and interdict was conjoined with the declarator
 Jan. 14, 1801. Lord Glenlee, Ordinary, pronounced an interlocutor unfav-
 ourable for the respondent's claim, which was reclaimed
 against by him to the Court.

It was contended for the appellant, that the clause in the
 lease was only meant to secure to the tenant a perpetual
 right to such houses and gardens as he might have lawfully
 and necessary occasion for, in the ordinary course of his
 business, during the currency of the lease; but that it was
 grossly fraudulent and illegal to make it a cover for obtain-
 ing such a right to the whole property, by pretending to
 lay it down in the form of a vast garden, for the formation
 of which, in such a situation, there was no imaginable or
 assignable inducement. For the respondent, it was main-
 tained, That the lease was nothing more but a right of feu.
 That a right of feu, in the law of Scotland, was just a lease
 in perpetuity. The ground let is in the neighbourhood of
 Linlithgow, a large and extending town; and, in getting the
 lease in question, John Craig had a building speculation in
 view. He was entitled to avail himself of the clause in the
 lease in any way that might be most for his advantage, and

therefore he admitted distinctly that his object in the operations complained of, was to entitle himself to demand a feu-right to the whole ground in his possession, and maintained that the lease enabled him to do this, if, in point of fact, it should be occupied with houses and gardens at the expiration of the lease.

1808.

BALDERSTONE,
&c.
v.
HAMILTON.

Of this date, the Lords pronounced this interlocutor:— June 11, 1801.

"Alter the interlocutor reclaimed against, remove the interdiction in the suspension, and find the letters orderly pronounced; and, in the declarator, assoilzie the charger from the conclusions thereof, and decern." On reclaiming petition the Court adhered.

June 30, 1801

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded by the Appellants.—The obligation upon which the respondent founds, was never produced nor put in evidence. And, for ought that appears, it might be defective in legal form, or otherwise void in law. But even supposing it an existing valid deed, the words of the obligation are limited to houses then built, and are further controlled by the clause in the lease, by which he is to have a feu-right only "of such part of the lands above mentioned, upon which the said John Craig, or his foresaids, have built a house or houses, or shall have made into gardens, in terms of the foresaid tack." And, therefore, the clause was never intended to confer a right to seize upon the whole property, to the great detriment of the landlord, and without any possibility of profit on his part. In construing, besides, the writing, the principle of a fair construction must obtain, such as will sustain the obligation on the one hand, and include nothing which it does not expressly include on the other. In the first place, then, the clause only says that the tenant shall have a feu-right to *such parts* of the land as he may build on or make into gardens; but his claim is for a *right of the whole*. 2. The clause says merely, that the tenant shall have a feu-right to such houses and gardens as the said tenant himself shall build or form on the grounds. The respondent, however, has not built a single house, nor laid down a single garden on the property; but he has taken upon him to grant feu-charters to a variety of persons, by whom some houses and gardens have been constructed. These acts are beyond his power, and the charters null and void.

1808. *Pleaded for the Respondent.*—The obligation in question—
 though it has not been produced, has been put on record.
 BALDERSTONE, Sasine has followed upon it, and that sasine appears in the
 &c. register of sasines. Both the words of the tack and the
 v. obligation are unlimited in their terms, to the extent of the
 HAMILTON. lands conveyed. And from these it clearly appears that it was
 the distinct understanding of the parties at the time, and from
 the express words used, that John Craig, and his heirs and
 assignees, should be entitled to a feu from the landlord,
 the whole of such parts of the lands let on lease as, at the termination
 thereof, should be built upon, or converted into gardens. The
 appellant, Mr. Balderstone, argues that the clause should receive a
 strict interpretation, because it was in all respects an unfavourable,
 and therefore an inequitable bargain for the landlord; but such an
 argument cannot for a moment be listened to, if, in point of fact, such
 has been the nature of the bargain between the parties. He further
 argues, that it was only such house or houses as the tenant should
 himself build for his own purposes, or the purposes of his bleachfield.
 But how the turning of this ground into houses and gardens could aid
 the purposes of his bleachfield is not so easily apparent; or how a feu-right
 should be bargained for in reference to the same. Such theories are quite
 untenable, and only disclose the groundlessness of this action. For the
 rights conferred by the tack and relative obligation are clear and express,
 and therefore the respondent cannot be restrained in the exercise of the
 right now vested in him.

After hearing counsel, it was
 Ordered and adjudged that the interlocutors complained
 of be, and the same are hereby affirmed.

For Appellants, *Sir Sam. Romilly, F. Jeffrey, Henry Brougham.*

For Respondent, *Henry Erskine. John Connel, Francis Horner.*

NOTE.—Unreported in the Court of Session.

WM. RICHAN, Esq. of Rapness, . . . Appellant ;
 THOMAS TRAILL, Esq., and Others, Trustees } Respondents.
 of the deceased JAMES STEWART, }

1808.
 RICHAN
 v.
 TRAILL, &c.

House of Lords, 1st July 1808.

SUCCESSION—PROPINQUITY—SERVICE—PAROLE—HABIT AND REPUTE.—Circumstances in which it was held that the appellant had failed to establish his claim to succeed as heir of his deceased cousin, his propinquity appearing to be through his mother, though he alleged, but failed to prove, that it was traced up through her, until it met in descent from one common ancestor in the male line. In the House of Lords, remitted for consideration, with special directions.

The following case arises out of the appellant claiming an estate, as heir of the deceased James Stewart, in the following circumstances:—The deceased James Stewart, having left no issue, William Richan was habit and repute his heir. The deceased had himself acknowledged this to all and sundry. And although this connection was through the appellant's mother, Mrs. Jean Stewart, yet it was traced up until the deceased and he met in descent from one common ancestor. His mother was daughter of Robert Stewart of Eday, son of Captain Stewart of Eday, who was the son of Sir James Stewart of Tullos, third son of Robert Stewart, first Earl of Orkney, the common ancestor of both. In consequence of the deceased's blindness, and when his sister died, the appellant had been sent for to carry her head to the grave; and, by the respondents, he was appointed to do this last office to the deceased himself.

In these circumstances, he, immediately after the death, procured himself served heir to the deceased—his claim setting forth, "that I am nearest and lawful heir in general to the said James Stewart, my cousin." He was served heir accordingly by the verdict of a jury.

But it then appeared that the respondents had obtained from the deceased, a short time before his death, a trust-deed, conveying his whole property, amounting to £6000, for pious uses, and were actually in possession. This trust-deed having been hurriedly executed, wanted the necessary clauses for vesting the property, and they were in the course of applying to the Barons of Exchequer for a gift of *ultimus hæres*, when the appellant brought the present action of reduction to set aside the trust-deed; which was met on the respondents' part by a reduction of the appellant's service, which being remitted ob

1808. *contingentiam* of the other, Lord Meadowbank then ordered the defender (appellant), in the reduction at the instance of the trustees, "to give in a condescendence of the facts he held himself in a condition to prove in support of his service."
- RICHAN**
v.
TRAILL, &c.
June 15, 1797. Regularly vested with the character and *status* of heir, by the verdict of a jury, in his service, he at first thought it unnecessary to adduce any further evidence, the legal presumption being (as he maintained) in his favour, until the contrary was proved by some party having a better title. But afterwards a condescendence was given in.
- Mar. 10, 1798. Lord Meadowbank pronounced this interlocutor: "Finds that the two separate claims of propinquity condescended on by William Richan, in support of his service challenged, infer, though proved, only relationship to the defunct, which in that by Jean Richan, the grandmother of the defender, never affords by the law of Scotland any right of succession whatever, and in that by Margaret Richan (by mistake for Stewart), only affords it when a service to her descendants would carry the succession, which, in the present case, would be totally nugatory: Finds, That in order to support the service, it was necessary to condescend on and prove a precise line of propinquity, instructing an heritable *jus sanguinis* in the person of the defender; and as his attempt so to do appears to have failed, therefore reduces the said service, without prejudice to the defender's taking the depositions to lie *in retentis*."
- A mistake appearing in this interlocutor, he petitioned, stating that it was not through his grandmother, nor through Jean Richan that he claimed relationship, but through his mother, Mrs. Jean Stewart, descended from the same family of Stewarts with the deceased himself; and craved to be allowed a proof accordingly. A proof was allowed. Upon
- Nov. 12, 1801. which the Lord Ordinary pronounced this interlocutor:—"Being of opinion, according to the finding of the interlocutor of 10th March 1798, that a particular degree of propinquity must be made out to entitle a claimant to be served heir to a defunct; and being also of opinion, that if the defendant (appellant) had any expectations of further proof by writing, or any ground of complaint against witnesses not answering properly questions put to them as havers, application for remedy should have been made to the Lord Ordinary or the Court during the long and repeated indulgence he has enjoyed; and, at any rate, before the circumduction of the 16th January last was ac-

" quiesced in and allowed to become final; and that, in like manner, he should have applied for authority to open the depositions *in retentis* before quoting or founding on them. Finds, That the defendant has still failed to make out any precise degree of propinquity betwixt him and the deceased, to entitle him to be served heir to the defunct by the law of Scotland; and that, therefore, his service was originally irregular and void, and adheres to the said interlocutor. Repels the objections to the pursuers' (respondents') title to pursue the reduction, in respect their title is *sua natura*, probative and prior to the service."

1808.

RICHAN
v.
TRAILL, &c.

On reclaiming petition, the Court at first altered this interlocutor; but afterwards sustained the reasons of reduction of the service, in respect the proof did not support the condescendence of his pedigree. On further petition, the Court adhered.

Jan. 28, 1803.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—This is *not* a competition of briefs, the appellant being regularly possessed of the character and status of heir by his service, the question is not, Whether he shall be vested with, but whether he shall be *divested* of that legal character by the respondents, who cannot show that they have a better title as heirs, who do not prove that the defender is not the heir, and do not say that any other is a nearer heir, and therefore have no title to challenge that vested right. A service affords evidence that there was consanguinity, or inheritable relationship between the appellant and the deceased; and the retour bears the appellant to be *legitimus propinquior hæres Jacobi Stewart*

* Note by Lord Ordinary.—"The Ordinary cannot find evidence that the Stewarts in How were the Stewarts of How, and descended either of Colonel John Stewart, or his brother Captain Robert of Eday. He would have held repute sufficient evidence, had it been precise and decided; but it does not appear to be either the one or the other, so as to entitle a juryman to serve the defender as any particular relation to the deceased, or as either one particular relation or another particular relation. However probable, therefore, it may be that the defender stands in one inheritable degree of propinquity or another, the Ordinary cannot find such a probability that the law would recognize as proof from habit and repute, nor does he think that habit and repute would be sufficient to serve, unless applicable to a precise degree of relationship."

1808.

RICHARD
v.
TRAILL, &c.

Ross v. Agli-
anby, F. C.
July 3, 1792.
vol. x. p. 459.
Affirmed on
Appeal, July
11, 1794.
Vide ante,
vol. iii. p. 365.

consanguinei sui. The word consanguineus properly signifies a relation on the father's side; but even were it acceptable of both significations, it would not affect the present question; for here the context fixes the sense,—when the jury *retoured* the appellant nearest and lawful heir his cousin, they must be understood to express the *inheritable line*. And, therefore, before the appellant is bound enter into a defence of his service, the trustees are bound produce a valid title to pursue a reduction of that service. It is only a party showing a better title as heir who can do so. The trust-deed does not confer that title, because, in truth, it was not the will of the deceased, and is, besides, devoid of the usual formalities to convey heritage. It was executed by the aid of notaries. One of the witnesses was under fourteen. All the witnesses did not see the deceased touch the pen, nor hear him desire the notaries to subscribe for him. Nor was it read over to him in presence of the notaries and witnesses. Independently of this, the proof adduced establishes and supports the service, that the appellant is the nearest lawful heir to the deceased.

Pleaded for the Respondents.—The respondents having been for several years in quiet possession of the deceased estates, under the will or settlement, cannot be dispossessed or their title quarrelled, by one who does not show a better title. The validity of the appellant's service, his propinquity or title to sue, must be first discussed before the trust-deed of the respondents can be assailed or questioned by him. In his efforts to prove a particular degree of relationship to the deceased he has failed. He contends, that it is sufficient if the proof shows that he is, or that there is reason to suppose that he is, connected in blood with the deceased, though he is not able to show the precise relation, or that he is heir at law, a doctrine that is quite unsanctioned and untenable in law. The service, therefore, can be of no use to him. It cannot form the subject of close inquiry, because neither in the brief, nor the verdict of the retour, nor in the proof laid before the jury, was the any course of descent or line of propinquity pointed out. The jury had nothing before them but parole testimony and a vague report, without any attempt to show how.

Earl of Cassilis v. Earl of Winton, July 26, 1629. M. 1442.

After hearing counsel, it was

Ordered and adjudged, that the cause be remitted back to the Court of Session to consider the several interlocutors appealed from, and the interlocutor

22d June 1802 ; and more especially to review all parts of the said respective interlocutors which find, or purport to find, that, in order to support the service, (in such a case as the present), it was necessary to condescend and prove a precise line of propinquity, instructing an heritable *jus sanguinis*; and that a particular degree of propinquity must be made out (in such a case) to entitle a claimant to be served heir to a defunct ; and that the defender having failed to make out a precise degree of propinquity between him and the deceased, his service was (in such a case as this) originally irregular and void ; and more especially, also, to review so much of the said several interlocutors as repel, or purport to repel, the objections to the respondents' title, in their action of reduction of the service, to pursue that reduction upon the ground that their title is found to be *sua natura* probative ; the Court having regard, in such review, to the nature of the objection to the said title as alleged against the validity of the trust-deed in the process of reduction of that deed. And further, to consider how far the reduction of the service, in the circumstances of the case, (the finding in the interlocutor making no mention of possession, or of the effect thereof), was a *due proceeding before the objections to the validity of the said deed alleged in the process of reduction thereof*, which was commenced before the reduction of the service were discussed and decided upon ; and, generally, to review the several interlocutors complained of, and proceed thereafter as to them shall seem just.

1808.

RICHARD
v.
TRAILL, &c.

For Appellant, *Sir Sam. Romilly, J. P. Grant.*

For Respondents, *Wm. Adam, F. Horner.*

Note.—It is stated, in a note to the report of another case in the Faculty Collection, vol. xvi. p. 731, that, “ By the Court of Session the trustees were understood to be in possession of the heritable as well as the moveable property ; but the fact of this possession seems to have been disputed in the House of Peers.” It is also stated that, under this remit, the judgment was applied by the Court of Session, and informations ordered on the points remitted (27th May 1810) ; but the cause was not further proceeded with, and no judgment was therefore pronounced under the remit.

1809.

[Fac. Coll. vol. xii. p. 527.]

SMITH, &c. v. MACNEIL.	The Rev. Dr. JOHN SMITH, and the Rev. Dr. GEORGE ROBERTSON, Ministers of the Parish of Campbeltown,	}	<i>Appellants ;</i>
	Major HECTOR MACNEIL of Ardnacross,		<i>Respondent.</i>

House of Lords, 20th Feb. 1809.

TEINDS, OLD SUBVALUATION OF—ACTION OF APPROBATION.—An action of approbation of the report of the subcommissioners of the subvaluation of the teinds of the lands of Ardnacross, belonging to the respondent, taken in 1629, was brought, in order to have the same approved of, with the view of showing that the teinds of these lands, prior to the minister's last (second) augmentation, were exhausted. The minister objected on various grounds: Held, that the respondent was entitled to decree of approbation, and that the objection stated, that the minister was not cited to appear, was sufficiently disposed of by the fact, that as he was stipendiary, it was sufficient that the titular appeared to have been made a party to the subvaluation.

The appellants, the ministers of Campbeltown, having recently prevailed, notwithstanding a previous augmentation in 1796, in obtaining a second augmentation of stipend, in a new process, in which the Duke of Argyle and the respondent were called as parties; the respondent found it necessary to bring the present action of approbation to have the old report of the subcommissioners, or subvaluation of teinds taken in 1629, in so far as regarded his lands of Ardnacross, approved of, with the view of showing, by that subvaluation, that the teinds, prior to this *last* augmentation, were exhausted within the parish within which these lands were situated, so as in effect to form ground for reduction of that augmentation *in toto*.

At the time when Charles I. executed the general revocation of church lands and teinds, and commenced the process of reduction of all such grants, His Majesty, in Jan. 1627, appointed certain commissioners to confer with those who had any interest in the church lands or teinds, and to value teinds, and to name subcommissioners in various parts of the country for that purpose. Subcommissioners were accordingly chosen by each presbytery in Scotland; and the nominations having been approved of, commissions were issued to them, directing them as to the form of proceeding. And by the act 1633, c. 19, appointing a new commission

valuation of teinds, the commissioners are directed to prosecute and follow forth the valuation of such teinds, parsonage, or vicarage, within the kingdom, as then remained unvalued, "and also receive the reports of the sub-commissioners appointed within ilk presbytery, of the valuation of whatsoever teinds, led and deduced before them, according to the tenor of the subcommission directed to that effect; and to allow, or disallow the same, according as the same shall be found agreeable or disagreeable, from the tenor of these subcommissions."

Until the subcommissioners' report of the valuation were approved of by the commissioners, their legal effect was not determined; but still, when fairly made, they were deemed thereafter as the standing rule according to which the tithes were paid.

The lands of Ardnacross, belonging to the respondent, were situated within the parish of Kilchounstaune, forming part of the united parishes of Kilcheran, Kilmichael, Kilchounstaune, and Kilchewan; and had been valued by the subcommissioners as ordered and directed. The same valuation had been approved of, at the instance of the Duke of Argyle, in so far as his lands were concerned, in a process raised by him for that purpose, in which he obtained decree in 1772. But the respondent having omitted to get the valuation approved of as to the lands of Ardnacross, brought the present action of approbation. The appellants objected to this process of approbation. 1. That the minister serving the cure of the parish in which the lands of Ardnacross were situated, had neither been called as a party, nor did it appear from the proceedings that he was cited to appear, or that he had appeared, although he had a most material and substantial interest therein; and, 2. That the subcommissioners, in fixing the amount of the teinds of the lands of Ardnacross, had not adhered to the mode of proof required by common law, or by the special terms of those instructions under which they acted; and that, therefore, there was no legal evidence of the amount of the respondent's teinds: And, upon these grounds, they contended that he was not entitled to obtain a decree of approbation of the report of the subcommissioners. To this it was answered, 1. That although no mention was made of the minister in the proceedings, he might, notwithstanding, have been present or been cited; for the presumption of law was, that *omnia rite et solemniter acta*; 2. And even supposing the presence or the cita-

1809.

SMITH, &c.
v.
MACNEIL.

1809. tion of the minister was essential to the validity of a subv
 ———— luation, this rule only applied where the minister was pa
 SMITH, &c. son, that is, when he drew the whole teinds of the paris
 v. as occurred in the case of *Ferguson v. Gillespie*, but wher
 MACNEIL. as in this case, the minister was a stipendiary, it was qui
 Ante vol. iii. enough that the titular is made a party.*
 p. 584.

The Lords Commissioners of Teinds pronounced this i
 Jan. 28, 1801. terlocutor: "The Lords having advised the memorials f
 "both parties, with the libel and report of the subcommi
 "sioners of the presbytery of Argyle libelled on, they rep
 "the objections offered to the approbation of the said r
 "port, and ratify, allow, and approve the report of the sa
 "subcommissioners, in so far as concerns the valuation
 "the pursuer's lands libelled, and interpone their decre
 "and authority thereto, and decern conform to the conc
 "sions of the libel; reserving the consideration of expens
 "to the ministers of Campbeltown, until this day eight days
 June 3, 1801. On reclaiming petition the Court adhered.

Against these interlocutors the present appeal wa
 brought to the House of Lords.

Pleaded for the Appellants.—Though the teinds of th
 respondent's lands of Ardnacross are said to have been va
 lued by the subcommissioners of the presbytery of Argyle i
 the year 1629; yet, from the record of their proceedings,
 appears that the minister serving the cure of the paris
 neither attended, nor was cited to attend, for his interes
 and he being a necessary party, all these proceedings, in
 far as regarded the interest of the minister serving the cu
 of the parish, are radically null and void. 2. The subcom
 missioners, in fixing the amount of the teinds of the respo
 dent's lands of Ardnacross, have not adhered to the mode
 proof required either by the common law, or by the tern
 of those transactions under which they acted. By th
 common law, proof may be made by writing, by witness
 or by the oath of party; and the subcommissioners we
 empowered to try and inform themselves, by all the lawf
 ways and means they can, of the true worth of the land
 stock, and teind; and they are specially empowered to pr
 ceed by writ, witnesses, or oath of parties. In trying th
 value, however, of the teinds of Ardnacross, no witness
 were examined, no writing was produced, nor was the
 any reference to the oath of party; but the whole procee

* The Court decided the question upon this second point.

ed upon the declaration of a person in the name of the proprietor of the lands, which was consented and agreed to by the titular of the teinds. But this declaration proves nothing except that there was a collusion between the parties, which cannot affect the interest of the minister, who neither appeared, nor was cited to appear, in any part of these proceedings. 3. And the present question is and can in no way be affected by the proceedings and decree obtained in the process of approbation brought by the Duke of Argyle. In that process the present objections were not stated or discussed. Neither can the decree of absolvitor, in the reduction brought of that decree of approbation influence the present questions; the sole defence, in that reduction, made by the Duke, having been that of *res judicata in foro contentioso*, which prevailed in a point of form which is not applicable to the circumstances of the case between the present parties. 4. If the heritor or titular has a right to appear, in order to have his lands valued as low as possible, so has the stipendiary minister an interest to appear, that they may be valued as high as possible, in order to leave room for future augmentations. These two parties have opposing interests to maintain, and to argue, in these circumstances, that the citation of the titular supersedes the necessity of citing the stipendiary minister, is plainly against all rule of right and substantial justice.

Pleaded for the Respondent.—It is not pretended that there was any thing in the subvaluation in question unfair or collusive; and it appears *ex facie* of the proceedings, that the subcommissioners acted upon legal evidence, viz. old rentals of forty years standing, and payments of rents in conformity thereto. This is the very evidence specified in the letter of King Charles I., dated the 28th Feb. 1628; and which, when not controverted by any of the parties, has, in practice, been always held as sufficient. And it plainly appears from the report of the subcommissioners, that the parsonage teinds of the parish of Kilhoustaune had been “rentalled, attour the space of forty years immediately preceding,” at the valuation thereby put upon them; the appellants do not deny that so far the evidence was strictly legal; but it was only with regard to parsonage teinds that the rentals of forty years ever were held to be necessary, and therefore the rule did not apply to vicarage teinds, the *ipsa corpora* of which was generally uplifted by the minister himself. But, 2. The valuation was made in the presence of the proper par-

1809.

 SMITH, &c.
v.
MACNEIL.

1809. ties, viz. the landholder whose tithes were valued, and the titular who had right to these tithes; and, of course, had the primary and material interest to see them valued as high as possible. And, after so long a time, the general rule of law is, to presume that the procedure was conducted *rite et solemniter*. And therefore, on the same ground, to presume the minister's presence in the valuation.

SMITH, &C.
v.
BOGLE.

After hearing counsel, it was
Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellants, *David Boyle, Wm. Alexander.*

For Respondent, *Sir Samuel Romilly, Henry Erskine,
Gilbert Hutchison.*

[Fac. Coll. vol. xiii. p. 363.]

JAMES SMITH, Merchant in Leith, WILLIAM
SIBBALD, Merchant there, and Others, } *Appellants;*
Underwriters on the Cargo of the Ship }
Concordia, }

ROBERT BOGLE, JUN., Merchant in Glasgow, *Respondent.*

House of Lords, 16th March 1809.

INSURANCE—CONCEALMENT—UNSEAWORTHINESS.—In effecting an insurance on a certain cargo, the vessel in which the cargo was to be shipped from Jamaica to Clyde, was represented to be a very good vessel, and that no material damage had occurred from her touching on a rock in going into the harbour, while the letters which the insured had received from his correspondents in Jamaica, previous to effecting the insurance, gave a very different account of the vessel, and intimated doubts whether she would be fit to take any cargo, or sail with convoy at the time specified. On proceeding on her voyage with her cargo to Port Antonio to join convoy, she experienced rough weather—did not reach in time for convoy—was found disabled, and, after survey, was finally abandoned, as unfit to proceed on her voyage. Held the underwriters liable under the policy. Reversed in the House of Lords.

Wishing to effect insurance, the respondent wrote to his agents, Messrs. Scott, Smith, Stein and Co., the following letter: “Gentlemen, I find that sugars intended to have
“ been shipped per *Minerva*, on account of R. W. Fearon,
“ and on which you insured £1050, have not gone on board;
“ but that they are intended to be shipped in the *Concor-*
“ *dia*, Simpson, expected with the June fleet; I suppose

" your underwriters will not have any objection to the risk
 " being declared on the Concordia in place of the Mi-
 " nerva; the Concordia *is a very good vessel*; but it may be
 " proper to mention, that, on her going into Morant Bay,
 " she touched upon a rock, but from which, it is thought,
 " *that she did not receive any material damage*; however,
 " to prevent all accidents, her bottom was to be examined
 " before any shipments were made in her. I therefore do
 " not think that any *additional risk can arise*."

1809.

SMITH, &c.
 v.
 BOGLE.

In consequence of the information contained in this letter, the underwriters demurred to execute any policy on the Concordia.

But afterwards the respondent wrote again. " You for-Sept. 6, 1799.
 " merly mentioned that your underwriters were rather *shy*
 " *of the Concordia*; I have got further orders for insurances
 " on her, and as she has got a *thorough repair*, they may
 " now be induced to take her, particularly as I now want
 " dye-wood insured; if so, you may go the length of £1140,
 " valuing at £20 per ton, at and from Jamaica to Clyde,
 " with liberty to join convoy at the place of rendezvous;
 " premium fifteen guineas per cent., to return six per cent.
 " for convoy, and three per cent. if she sails by 1st of August.
 " At these terms I have got considerable sums done; but
 " as they charge in London sixteen guineas, with a return of
 " 4 per cent. for sailing by 1st August, rather than not get
 " done, would give that premium, say sixteen guineas to return
 " 6 and 4."—P. S. " Letters of 14th July say, the captain,
 " Simpson, was expected to clear out his ship the next day."

In consequence of this letter, £1140 insurance was effect-Sept. 12, 1799.
 ed on the dye-wood on board the Concordia, " at and from
 " Jamaica to Clyde, with liberty to join convoy at the
 " place of rendezvous." And another insurance in same
 terms on the sugars to the extent of £300. After the acci-
 dent she had been surveyed and repaired, and an affidavit
 by the ship carpenters was produced, stating, " That she is
 " now a staunch vessel, and fit to carry the cargo to any
 " port in Great Britain."

She was to sail on the 15th of July, but, owing to delays
 in making her repairs, she did not proceed to sea until the
 22d July. She did not arrive, from stress of weather, at Port
 Antonio, the place where she was to join convoy, until after
 convoy was left; and, owing to various accidents and da-
 mages sustained, she remained there several months, and
 was ultimately found unable to proceed to sea, and finally
 abandoned to the insurers.

1809. Action was brought by the respondent on the policies, to which defences were lodged, alleging fraud and concealment of material circumstances in regard to the real condition of the Concordia. In particular, Bogle and Co. of Jamaica had written to Adam and Mathie on 15th April:
- SMITH, & Co.
%
BOGLE.
- April 15, 1799. "Should she, after being properly surveyed, be deemed seaworthy, we shall give her a full load home, &c.,—and we think that if the vessel is found worthy, that she will be ready to sail with the convoy appointed to sail the 30th
- April 17,—"June." Two days thereafter, Bogle and Co. wrote a letter of the same import to the respondent. On the 29th of same
- April 29,—month he received a letter, which declared that he "feels a reluctance in shipping on that vessel." And on the
- May 17, —17th May following, Keith Jopp, a partner of Bogle and Co., wrote the respondent; "I fear she (Concordia) will not be able to go by the next fleet, which will be a great inconvenience to us, as we intended sending you a considerable remittance by her. If you have any money of her owners in your hands, I wish you would keep it, lest they should demur to the expenses, which I see will be great." Again,
- May 18, —on the 18th May, Bogle and Co. wrote to the respondent the following letter, which was received on the 6th July :
- "We are still in the same state of uncertainty respecting the Concordia as when we wrote you last. After various delays, she has at length discharged all her outward cargo, and has got to the hulks to be hove down, for the purpose of being surveyed. We are much disappointed that this has not taken place before now; we fully expected it; and think it might have been done some time ago, had Captain Simpson exerted himself with any degree of activity. He has received every assistance from us in discharging the cargo, and in getting his vessel ready for survey. Should she be found seaworthy, and in a condition to take in a cargo immediately, we think she will go with the first fleet appointed to leave the place of rendezvous about the 30th of June, the cargo being ready here and at Old Harbour; but, should she stand in need of repairs, we think her getting ready for that fleet very doubtful."
- May 19, —Again on the 19th May, received 6th July, "Owing to the most unaccountable negligence and delay in the captain, the Concordia has not yet been surveyed. I have said all I could without effect. Yesterday I carried up Shaw of the Adventurer, and Foote of the Maria; just as they got sight of the keel, some of the tackling gave way, and the vessel was obliged to be righted. They don't think any

" thing material is wrong, but to-morrow they see her
 " again. I am afraid she won't sail with the June fleet,
 " though the greater part of her cargo is ready; this will
 " be a disappointment both to you and us. If you owe the
 " owners any money take care of it if you can, as I dare say
 " they will make objections to our disbursements." On the
 13th July another letter states: " We cannot well say how
 " much trouble and inconvenience we have been put to in
 " the business of the Concordia, both from the misfortunes
 " of the vessel and the extraordinary want of activity in the
 " captain. We have been kept in a state of constant uncer-
 " tainty as to the time she would be ready to sail." The
 letter concludes: " We must advise you to take care how
 " you engage with such a captain and vessel."

1809.
 SMITH, & C.
 v.
 BOGLE.

July 13, 1799.

It was alleged by the appellants that all these letters were in the respondent's hands when he wrote to the broker on 6th Sept. 1799 to effect the insurance, but which he concealed from the insurers.

On the 26th of June the ship was surveyed, and reported to be capable of carrying a cargo to Great Britain, on undergoing certain repairs therein specified. These repairs were completed on 13th July. Her cargo re-shipped on 22d July, and she sailed on that date for Port Antonio to join the next convoy, which was to leave on the 25th July. She ought to have arrived in time to sail with convoy, but did not reach Port Antonio till 3d August, five days after convoy had sailed. She experienced rough weather, lost her sails. Here the captain died. His successor, entertaining doubts of the ship's capacity for the voyage, insisted on a survey, which being procured, the result was, that the surveyors reported her unfit for sea in her then condition. The extended repair was £2930. The new captain also died, whereupon Berry was appointed master, who insisting also on a survey, before he would go to sea with her, it was found that the repair required would be a great deal more than she would be worth after the repairs were done. Whereupon the insured abandoned, and claimed under the policy.

After proof, which was allowed, the Judge Admiral pronounced decree in terms of the libel for the sums insured. Mar. 4, 1803.

On bill of suspension, Lord Glenlee, after advising with the Lords, on report to them, refused the bill. On reclaiming petition to the whole Lords, they adhered.* Jan. 26, 1804.

May 22, —

* Opinions of the Judges.

LORD PRESIDENT CAMPBELL said, " The letter, p. 2 and 3, was

1809.

SMITH, &c.
v.
BOGLE.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The respondent, in effecting the insurances in question, concealed from the appellants several circumstances respecting the condition of vessel, materially affecting the risk, with which he was at the time acquainted. He not only concealed material circumstances, but actually misrepresented the information he received from his correspondents in Jamaica in several particulars. 1. In representing the Concordia as “a very good vessel,” when, from the above letters, the reverse was obvious. 2. That the Concordia had got a thorough repair after the accident of touching upon the reefs, whereas it turned out that this could only be partial; and, 3d. In representing that his advices say, “that Captain Simpson was expected to clear out his ship next day;” whereas all the letters he received state doubts of the vessel being able to sail with convoy. It is further manifest, that the vessel was not sea worthy when the risk commenced. She sails from Port Antonio, after her repair, for to join the convoy, and she becomes so unnavigable as to occupy a whole fortnight in what is usually deemed a passage of two or three days. The hull got no damage in this passage, for it is admitted she received no injury, so that it must have been owing to some incapacity in the ship previously. She had remained at Port Antonio for seven or eight months, exposed to the intense heat and heavy rains of that climate. There was unnecessary delay here, owing to the inefficiency of the

shown to the underwriters. As to the first point, namely, the allegation of concealment, I think there was no concealment of the condition of the ship. There is a little uncertainty in Mr. Bogle's letter of 6th September to the broker, as to the time of sailing, but, by the policy itself, there was a considerable latitude as to the time of sailing.”

LORD CULLEN.—“I am for adhering.”

LORD HERMAND.—“I am for altering.”

LORD BALMUTO.—“I am for the same.”

LORD CRAIG.—“I am for adhering.”

LORD PRESIDENT CAMPBELL further said, on petition for Brown, “The insurance here was effected on 13th August. The respondent had then got the letters 19th and 29th April, 18th May and 19th May, and 13th July. One of these is not favourable to the respondent, and ought to have been shown to the underwriters.”

captain, and this delay was tantamount to a deviation, and did actually result in misfortune, and ultimate loss and abandonment of the vessel.

1809.

SMITH, &c.
v.
BOGLE.

Pleaded for the Respondent.—The first objection made is, that there was concealment. In answer to this, the respondent contends, that there was no concealment here of any one material circumstance. The law does not require that the assured shall give information to the underwriters of every circumstance respecting the vessel or cargo, or persons connected with the ship. It is only of material circumstances, such as may vary the nature of the contract, and the risk undertaken. In this case, there was no such concealment, nor any which, according to the law laid down by Lord Mansfield in *Schollbred v. Nutt* at N. P. after *Hill v. Vide Park*, Term, would vacate the policy. The accident which had befallen the vessel was communicated to the underwriters. Concealment of circumstances, as to the time of sailing, no doubt is material, but the 25th July was mentioned here with no positive assurance held out that she would sail at that time; and, indeed, had it not been for the bad weather, the ship, after she left Old Harbour, would have arrived at Port Antonio in time to sail with convoy on the 25th July. Nor was the respondent bound to communicate the information as to the inactivity of the captain, as this goes only to the character of the captain, not to the essentials of the policy. But, 2d. It has been objected, that the ship must have been unseaworthy at the time she sailed. This is founded on the circumstance, that, soon after commencing the voyage, she became unmanageable without any visible or adequate cause. The answer to this is, that she got a thorough repair before leaving Old Harbour. That she was surveyed and declared tight, staunch, and strong, and capable of taking a cargo to England. She did not become leaky in a day or two after she sailed, and her misfortunes, so far from arising without any visible or adequate cause, were accounted for by events which it is impossible to foresee. On this voyage she bore a fortnight of uncommon bad weather without any leak. By this bad weather she missed the convoy; and the cause of subsequent disaster in the harbour of Port Antonio arose solely from exposure to intense heat and heavy rains of the climate, which are commonly very destructive to ships. 3. The steps taken there, in disposing of the cargo, and in the abandonment, were quite justifiable in the circumstances; for after the ship was declared

Vide *Marsh* shall on Insurance, p. 354.
Vide *Park*, vol. i. p. 493.

1809. unfit to proceed on her voyage, it was the best con-
all parties, without waiting to give notice, as is cont
THE PROVOST OF KIRKCUDBRIGHT, &C. for by the appellants.
v. After hearing counsel, it was
AFFLECK. Ordered and adjudged that the interlocutors comp
of be, and the same are hereby reversed, and the
defenders be assolizied.

For Appellants, *Wm. Adam, David Williamson*

For Respondents, *Thomas Plumer, J. A. Park.*

NOTE.—The reversal in this case upsets the judgment
Court of Session, given in *Adam and Mathie v. Murray, Mo*
Insurance, No. 6 as arising out of the same circumstances as
and will not support the doctrine laid down by Professor Bel
Commentaries, founded on both cases, as decided in the C
Session, Com. vol. i. p. 620.

THE PROVOST, MAGISTRATES, and TOWN-}	} <i>Appella</i>
COUNCIL of Kirkcudbright, . . .	
ARCHIBALD AFFLECK, . . .	<i>Respon</i>

House of Lords, 20th March 1809.

DEBTOR'S ESCAPE FROM PRISON—LIABILITY OF MAGISTRATES
this case, the prison was alleged to be strong and sufficien
respects, and the magistrates pleaded that there was no de
culpa on their part, no carelessness nor want of vigilance
part of the jailor, but that the escape was effected only
most powerful instruments and forces having been applied.
nevertheless, that they were liable.

Action was raised by the respondent against the
lants, as responsible for the escape from prison
debtor, William Herries, cattle dealer, imprisoned fo
in the prison of Kirkcudbright.

The escape was effected by the use of tools, used i
ting a hole in the ceiling of his chamber, and wrench
strong bar out of a window.

The defence stated by the magistrates was, that the responsibility, in such cases, only attached where the escape implies *culpa* on their part, as for example, an escape effected through the negligence or connivance of the jailor; but here there had always been the utmost vigilance and care bestowed in keeping the prisoner. There was no laxity in watching; and the prison was in all cases sufficient and strong, so as to make the escape appear to many almost miraculous.

1809.

THE PROVOST
OF KIRKCUDBRIGHT,
&c.
v.
APPELCK.

The Court found the magistrates conjunctly and severally liable in payment of the principal sum and interest libelled. And, on reclaiming petition, they adhered.

May 28, 1803.
June 17, 1803.
July 2, —

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—Although by the law of Scotland, it is required that prisons shall be secure and sufficient, yet it understands this sufficiency in a qualified sense, and not to cover forces and powerful instruments, as in this case were irresistibly used. It does not require that the magistrates shall provide guards around the prison wall all night, nor that the jailor should watch at the prisoner's door night and day. It does not require the prison of debtors to be like a felon's cell, shut up with close barred boards, in fetters and chains. Nothing of all this it understands. So that, before the magistrates can be held responsible, it must be made out that the jailor was negligent of his duty, or that the prison was insufficient for the purpose of safe custody. Here neither the one nor the other is proved to have been the cause. The jailor was vigilant. The prison was strong. And the only efficient cause or agent was the mechanical instruments that were applied.

Pleaded for the Respondent.—The magistrates are the keepers of the prison, as delegates of the crown. They are bound to have the prison sufficient; and to keep the prisoners securely. This duty is not imposed without a valuable consideration. They receive value in the privileges which the burgh enjoys. And the *reddendo* of their charter, by which the burgh holds of the crown, binds the vassal to "watch and ward." But, in point of fact, the prison here was insufficient. It was too low in the roof; the joisting and floor above were accessible to his operations. It was not arched; nor was there a ceiling, which would have prevented his operations from being carried on quietly. The joists were weak, and of fir deal; and the door on the stair

1809. defended only by a single wooden lock, and the wind
 a single bar of iron. Besides, had the jailor been vig
 ARNOT, &c. no such instruments could have been admitted into th
 v. son, nor any of the operations carried on. The magis
 HILL, &c. have adduced nothing in justification ; and the onus of
 ing this lying on them, they must be held liable.

After hearing counsel, it was
 Ordered and adjudged that the interlocutors compl
 of be, and the same are hereby affirmed.

For Appellants, *Sir Samuel Romilly, Henry Erskine*
 For Respondent, *Geo. Jos. Bell, Fra. Horner.*

NOTE.—Unreported in the Court of Session.

[M. App. Part I. " College," No. 3.]

Dr. ROBERT ARNOT, Professor of Theology
 in St. Mary's College, and Rector of the
 University of St. Andrew's; Dr. JAMES
 PLAYFAIR, Principal of the United Col-
 lege; Dr. JOHN HUNTER, Professor of
 Humanity; and Dr. JOHN ADAMSON, Pro-
 fessor of Civil History, in the said United
 College; and Dr. JOHN TROTTER, Profes-
 sor of Ecclesiastical History in St. Mary's
 College; all in the University of St.
 Andrew's, } *Appellan*

Dr. GEORGE HILL, Principal of St. Mary's
 College; MR. NICOLAS VILANT, Professor
 of Mathematics; Mr. JOHN COOK, Profes-
 sor of Moral Philosophy; the Rev. HENRY
 DAVID HILL, Professor of Greek; all of
 the United College of St. Andrew's; the
 Rev. JOHN COOK, Professor of Hebrew
 in St. Mary's College; and Dr. JAMES
 and Dr. JOHN FLINT, styling themselves
 Joint Professors of Medicine; all in the
 University of St. Andrews, } *Respond*

House of Lords, 26th May 1809.

COLLEGE—ELECTION OF PROFESSOR—CHANDOS FOUNDATION.
 election having been made of Dr. James and Dr. John Fl

Joint Chandos Professors of Medicine in the University of St. Andrew's, this was objected to as irregularly proceeded with, and as inconsistent with the terms of the foundation, and with the practice in that University, of electing Professors therein. It was answered, that, in practice, it was quite common in the other Universities of Aberdeen and Glasgow to make a joint election, and the practice was followed in the Church of Scotland of appointing an assistant and successor, which this appointment simply was. Held that the election was a good election. In the House of Lords reversed; and held the election illegal and void.

1809.

 ARNOT, &c.
 v.
 HILL, &c.

The present question arises out of the election of the respondents, Dr. James and Dr. John Flint, as joint Chandos Professors of Medicine in the University of St. Andrew's.

Dr. James Flint, the father, had been for nearly 34 years the Chandos Professor of Medicine in the University; but, having a strong desire, it was stated, to have his son, Dr. John Flint, to succeed him, he had made several attempts to procure him appointed joint Professor along with him, which had failed. But, availing himself of an opportunity which occurred, from the absence of those electors opposed to him, he subsequently moved in the matter, by letter to the University, alleging his age and increasing infirmities as rendering this step necessary.

The Chair of Medicine was founded by the Duke of Chandos. The foundation was in these terms, "To elect and choose such a person to be Professor of Medicine and Anatomie, as shall be provided with testimonies of his being adorned with the degrees of Master of Arts, and Doctor of Medicine, and shall be approved by the University, after such trial of his sufficiency as shall be by us or our successors further agreed to; and that such election shall then, and in all time thereafter, be made by the plurality of the voices of the Rector, Principal, Professors and Masters of the University for the time."—"And that he shall, after such instalment, have right to the entire produce of the above sum of £1000 Sterling as his salary, and shall have a free suffrage and vote with the other Professors in the University;" and that, "upon any emergent vacancy, they shall supply the office, within six months, with a person qualified as foresaid." In an after clause it provides, "That our said University shall have full power and liberty to make such further regulations as may be thought most conducive for the advancement of the foresaid profession," &c.

1809. The letter of Dr. Flint was received, and, at a meeting of the University, it was moved that it should lie on the table until next meeting.

ARNOT, &c.
HILL, &c.
April 28, 1804. When the meeting was convened, to consider Dr. Flint's letter, Dr. Playfair rose and moved, "That, in the meantime, a committee be appointed to examine the foundation of the Chandos Professorship, the regulations relative thereto established by the University, and precedents of former elections, and to report to a meeting subsequent to 15th May next, on which day the induction of Dr. Hunter was to take place, as Professor of Rhetoric."

This motion was negatived by six of the eleven members who attended; and who, in its stead, proposed and carried the following resolutions: "That if the Professor of Medicine shall resign his office, it is competent and expedient for the University, after accepting the resignation, to elect Dr. James Flint, and Dr. John Flint, his son, joint Chandos Professors of Medicine in the University, upon the following terms: 1st. That Dr. James Flint shall have, during his incumbency, the sole right to the salary, emoluments, and perquisites of Chandos Professor of Medicine. 2d. That Dr. John Flint shall not have right, during the incumbency of his father, to sit, deliberate, or vote, in any meeting of College, University, or Faculty. 3d. That the University shall have a right, at any time during the incumbency of Dr. James Flint, when they see cause, to summon Dr. John Flint to reside in this place, and to discharge the duties of Professor of Medicine, in attending the members of the University as physician, and examining candidates for degrees in medicine. 4th. That if Dr. James Flint, and Dr. John Flint, are elected joint Chandos Professors of Medicine, they shall be admitted at the same time; and that, previously to their admission, they shall subscribe, in presence of the University, a minute to be kept *in retentis*, expressing their acquiescence in the three preceding articles. 5th. That upon Dr. James Flint ceasing, by death, by resignation, or in any manner of way, to have right to the office, Dr. John Flint shall immediately succeed, without any new admission, to the full enjoyment of the rights, privileges, and emoluments of the Chandos Professor of Medicine; and that his standing in the University shall be reckoned from the date of his admission with his father." The appellants protested against these resolutions.

Dr. James Flint thereupon resigned, and retired; and he and his son were immediately elected joint Professors of Medicine, although the appellants objected that the meeting had not been called for an election, and moved, without success, an adjournment of the meeting.

1809.

ARNOT, &c.

HILL, &c.

The appellants, conceiving this to be an incompetent election, brought a bill of suspension and interdict, praying their Lordships to suspend the inductions of these joint Professors, till the merits of the election should be finally determined. Interim interdict was at first granted, but, after discussion, this was recalled by the Lord Ordinary, who at sametime July 3, 1804. passed "the bill to the effect of trying the question of right." On reclaiming petition the Court adhered. Whereupon the July 11, 1804. appellants brought the action of reduction and declarator, for setting aside the right of the presentees, and declaring the right of the members of the University, in the exercise of their patronage of this professorship. This action was conjoined with the suspension.

It was contended that the whole procedure in the election was unwarrantable and irregular. It was purposely hurried on before the induction of Professor Hunter, while, for this precipitancy, there was no cause or necessity, Dr. Flint, senior, being in full vigour of health. But the question of right to make the election and nomination is of great importance, both in a general point of view, as well as respects the interest of the University. In considering this question, it is necessary to keep in view the precise situation in which the Drs. Flints, father and son, actually are. It will be seen that this election made no alteration whatever in the situation of Dr. Flint, senior. He remained the actual incumbent, having the sole right to the salary, emoluments, and perquisites of the office. This appeared from the minute of election. Moreover, Dr. John Flint was not to have a right, during the incumbency of his father, to sit, deliberate, or vote in any meeting of College, University, or Faculty. It was true, by the minute, that the University were to have a right to summon, when they saw cause, Dr. John Flint to reside in St. Andrew's, and to discharge the duties of Professor of Medicine; and that, upon the father's ceasing, by death, resignation or otherwise, the son was immediately to succeed. But it was manifest that Dr. Flint, senior, was considered to be, and now is, the sole incumbent, and the son's right merely a gift as successor, to take effect at some after period. Such an appointment the appellants

1809. hold to be quite illegal, and inconsistent with the Chancery Foundation. It was further stated, that the cases referred to did not apply. In them the younger grantee enters immediately to the active discharge of the whole duty and the former incumbent is superannuated on his salary. No cases like the present have yet appeared; but the respondents cannot deny that it would be incompetent for a liferenter, or an heir of entail possessing the right of patronage of a church, to defeat the right of the fiar, or ne substitute, by appointing an assistant and successor to a parish minister. And the members of the College are in a similar situation. With regard to the practice of appointing joint Professorships in the Universities of Edinburgh, Glasgow, and Aberdeen, these have all been of a nature different from the present. The appellants know that not one of them have been sanctioned by the decision of the Court, as they are, besides, contrary to the clearest principles of law and equity. It may therefore be doubted how far this practice of appointing joint Professorships can be sanctioned and established by mere practice; but even if it could, if such practice has hitherto occurred in any one instance in St. Andrew's, although it has subsisted for 300 years. Nay, practice is at all to be allowed to affect the question, the same as the practice in this University has, since its foundation has been the very opposite of allowing such appointments, the case on this head falls at once to the ground.

ANNOT, &c.
v.
HILL, &c.
Laird of
Innerness v.
Nairn, Jan.
24, 1677,
Mor. Dec. p.
9900; Lord
Turbat v.
Oliphant,
Dec. 15, 1693,
Mor. p.
13115.

In answer, the respondents pleaded, that the University is in the exercise of those rights which are common to patrons of Professorships in Scotland, and in conformity to powers vested in them by the constitution of the Chandos Professorship, was entitled to elect Dr. John Flint, junior, assistant successor to his father. It is the imperious duty of patrons to make such elections, in all cases where the actual incumbent is either disabled, by age or infirmity, from performing the duties of his office, or where, from advanced age, it is probable that the aid of an assistant will be speedily required, and that the duties will be subject to interruptions.

At the time of the election, Dr. Flint was 70 years of age, had been 40 years in the Chair, and his request to have a colleague, was both reasonable and expedient. Were such an arrangement incompetent, then both the Professor and the University would be exposed to great hardship and

injury. For the Professor would be forced to resign, and thereby lose his salary, or be obliged to retain his office long after his usual abilities were impaired, and his bodily infirmities totally incapacitated him. In the present election every step taken, besides, was fair. There was no hurry or precipitancy in carrying it through. The arrangement had been contemplated for some years; and when at last it was carried through, every member of the University got timeous notice. The admission of Messrs. Flint is further regular, by the terms of the Chandos bond. The bond prescribing that the Professor "shall be instantly and in due form installed by the said Rector in his said office and profession of medicine and anatomy."

1809.
ARNOT, &c.
v.
HILL, &c.

The Lord Ordinary pronounced this interlocutor in the conjoined processes:—"In the suspension, repels the reasons Feb. 1, 1806. of suspension; and in the reduction, sustains the defences, and assolizies the defender; finds no expenses due to either party, and decerns; and, in order that this cause, which has already been so much agitated, may receive a speedy determination, dispenses with any representation being presented against the interlocutor." On reclaiming petition the Court adhered.*

Jan. 21, 1807.

Against these interlocutors the present appeal was brought to the House of Lords.

* Opinions of the Judges:—

LORD PRESIDENT CAMPBELL said:—"This is a question in regard to the election of a Professor. I am of opinion there is a majority of votes for Dr. Flint; and that this would be the case, even counting those who were absent.

"A conjunct election or nomination is not uncommon, and, in particular circumstances, highly expedient. Assistants and successors are often given to ministers and professors; and the nature of these offices does not exclude such appointment as in the case of judges or officers in the army or navy.

"There was sufficient time and notice given here; and there is no objection in point of fitness stated to the party. There ought to have been no interdict, either in this or the other case."

Petition, 11th July 1804.

"See my former notes. The interdict ought never to have been granted. We must hold the election to be good till set aside, and the admission follows of course."

President Campbell's Session Papers, (Jan., Feb., March, 1805.)

1809.

ARNOT, &c.
v.
HILL, &c.

Pleaded by the Appellants.—The election in question proceeded with in an irregular manner when the electing body was not full, and with an intention of preventing the exercise of the elective franchise of a Professor already appointed, whose induction was to take place in a few days, and whose sentiments were supposed to be hostile to the measure in question; and this without even the preter-necessity for such precipitancy. Further, the election in question, though it affected to be a joint election, was in fact an election of Dr. Flint, senior, as actual *incumbent* of the Professorship, to be his *successor*, or Professor in *reversion*. Such an election was incompatible with the rights of the electors in the present case, and an infringement of the rights and privileges of their successors; and the law on this subject has been confirmed by repeated decisions of the Courts in Scotland. It is therefore incompetent, in the present case, to make a joint election. Whatever practice may have obtained of joint appointments in the Cl. of Scotland, and in other Scotch Universities, no case of the kind has been sanctioned by any decision of the courts of that country; and the practice in the University of Edinburgh, and Andrew's in all time past has been decidedly hostile to joint appointments, the propriety of which have come repeatedly under discussion. Besides, the appointment in question is only an infringement of, and contrary to the regulations of the Professorship laid down at the time of its original institution; but also contrary to the act 20 Geo. II. c. 32, in far as it alters the number of patrons and administrators appointed by that statute.

Pleaded for the Respondents.—The terms of the Charter bond, which is both the foundation of the patronage, and the rule according to which it must be exercised, the University are invested with a power of making all such regulations as may be thought most conducive for the advancement of the “foresaid Profession.” The University, in the exercise of this discretion, considered that an assistant successor was, from the advanced age of Dr. Flint, necessary for the due and uninterrupted performance of the duties of the Professor of Medicine and Anatomy, and appointed a person to that situation whose qualifications were unquestionable, and whose character was unimpeachable. By the law and invariable practice of Scotland, it is the common right of patrons to appoint assistants and successors in the cases in which it is necessary. The patronage, in this

vested in the University, was a public trust, which it was the right and duty of the University so to exercise that there might be no interruption in the performance of the duties of the office, which, from age and inability of the present incumbent, was daily apprehended; and the election, in the present case, was both regular, necessary, and expedient.

1809.

ARNOT, &c.
v.
HILL, &c.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

“ My Lords,

“ This appeal respects the validity of the election of Dr. James and Dr. John Flint, to be joint Chandos Professors of Medicine in the University of St. Andrew’s.

“ In 1721, the then Duke of Chandos founded this Professorship in the University of St. Andrew’s. His Grace paid the sum of £1000 to that University, for establishing a fund for this Professorship. This sum was accepted of by the University; and they thereby became bound by law to observe the rules and regulations laid down by the founder, in so far as these were not duly altered. These rules and regulations were laid down in a bond granted by the University for this purpose. The bond is in the following terms. (Here his Lordship read the Chandos bond).

“ This instrument, from beginning to end of it, unless it is to receive some construction from the common law of Scotland, or by analogy from other cases which I am not aware of, appears to provide for this Professorship being to be enjoyed by a single individual at a time. It is true that there is a clause in it, that the University should have power to make ‘ *such farther regulations as may be thought most conducive for the advancement of the foresaid Profession.*’ This clause was founded on by the respondents, and shall be afterwards further noticed.

“ In 1770, Dr. James Flint was elected to the Chandos Professorship. Both parties agreed that he has faithfully executed the duties belonging to his situation during this long period. They agree also, that for the last nine or ten years he has been very desirous of having his son, Dr. John Flint, physician at Gainsborough, in Lincolnshire, appointed joint Professor with him. The appellants state his views to have been, to have his son appointed Professor in reversion. That Dr. James Flint was to perform the duties and receive the salary, and that the son was to have a sort of undivided moiety of the Professorship, and to be called, on his father’s death or resignation, in his turn, to perform the duties, and receive the salary of this office. This project had been for so many years in the view of Dr. James Flint, and was so well known to all the members of the Uni-

1809.
 ———
 ARNOT, &c.
 v
 HILL, &c.

versity, that it was strongly insisted upon by the respondents as doing away with any objection from want of notice of the transaction which I am about to mention. But, if a formal notice was necessary, in regard to this matter, I think your Lordships will agree with me, that no notoriety as to the wishes of Dr. Flint, senior, would be tantamount to such legal notice.

“ We now come down to the 21st of April 1804, when Dr. Flint’s wishes were first *formally* communicated to the University. At a meeting of the University held on that day, Dr. Flint gave in a letter, stating his desire to have his son, Dr. John Flint, joined with him in his office. This letter the meeting directed to lie upon the table till the 28th of April, and a meeting was appointed for twelve o’clock of that day, ‘*to take it into consideration.*’ (His Lordship read at large the minute of this meeting of the 21st of April).

“ It was very gravely insisted upon at your Lordships’ bar, that this minute, joined to certain communications made to Dr. Hill, in letters to Dr. Playfair and Dr. Adamson, gave seven days’ notice of the election which subsequently took place on the 28th of April. The minute of the 21st says merely, That the letter was to be taken into consideration on the 28th, and I see nothing in Dr. Hill’s letter more than this, that an intimation was given, that if Dr. Flint, senior, *should resign his office*, certain proceedings might be thereupon competent. It is necessary to recollect, that Dr. Flint’s letter was to be taken into consideration by persons not in the ordinary situation of patrons of Church livings, and the like, but by those who were to act according to the directions of the Chandos bond, and who were to execute their right of election, after a trial of the sufficiency of the candidate. This supposes that the electors were to have an opportunity given them of trying the merits of any candidate, and of allowing others to become candidates.

“ You would think me ridiculous were I to state, that this direction, contained in the minute of the 21st of April, joined to the communications made by Dr. Hill, could be considered as legal notice of an election held on the 28th of April. It would be a mockery to say, that the electors were thereby enabled to look out for other candidates, or that other candidates were enabled to offer themselves upon an intimation such as this. The electors could not know, *in* a legal point of view, if any vacancy would actually take place or not, or that an opportunity would occur to make any election.

“ Without using any harsh language, it appears to me to be quite impossible to disguise from one’s self what the meaning of this transaction was.

“ Then we come to the meeting of the 28th of April. (Here His Lordship read the minutes of the 28th of April at length).

“ It is quite impossible to say, that what is here termed an election, took place on due notice; the parties did not know, at least

ought not to have known, that any resignation would take place till they came to this meeting. Whether you consider it as a joint election, or the election of an assistant to Dr Flint, senior, it was an election of neither, in terms of the Chandos bond ; it was a mere appointment of two persons to this office, made by certain of the electors, without notice to, and contrary to, the consent of the others.

"I consider it to be quite unnecessary to enter into the other points of this cause ; upon the grounds already stated, I have no difficulty whatever in saying that this pretended election was illegal and void.

"I have only one observation more to add,—upon an argument stated by the respondents, that the proceedings might be supported under that clause of the Chandos bond, which allowed the University to make such farther regulations as might be thought most conducive for the advancement of this Professorship. I never saw any proposition less tenable than this, that the transaction in question could be supported on that ground. It is quite impossible for me to represent to your Lordships that it could be so justified. I therefore move, &c.

It was ordered and adjudged, That the election of Doctors James and John Flint was illegal and void, and that their presentation and induction ought to be set aside and reduced. And it is therefore ordered and adjudged, That, with this finding, the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of, and to proceed as to the said Court shall seem meet.

For Appellants, *Sir Samuel Romilly, Henry Erskine.*

For Respondents, *Wm. Adam, Adam Gillies, James Wedderburn.*

NOTE.—It is very inaccurately stated in M. App. Part I. "College," that "The Lord Chancellor, in making the motion for a reversal of the interlocutors of the Court of Session, said, that he wished the judgment to be understood to rest altogether upon its own merits, and to proceed entirely upon the circumstances of the particular case, and therefore inapplicable to, and having no bearing upon any of the others of a joint election, or of the election of an assistant Professor, which had been mentioned." No such observation as that now quoted was made by the Lord Chancellor.

1809.

ARNOT, &c.

v.

HILL, &c.

1809.

PLAYFAIR, &c. v. MACDONALD, &c.	The Rev. Dr. PLAYFAIR, Principal of the United College of St. Andrew's, Dr. HUNTER, Professor of Humanity, Mr. JAMES HUNTER, Professor of Rhetoric and Logic, and Dr. JOHN ADAMSON, Pro- fessor of Civil History in the said College,	}	<i>Appelle</i>
	The Rev. JAMES MACDONALD, Professor of Natural Philosophy, JOHN COOK, Pro- fessor of Moral Philosophy, Dr. JAMES FLINT, Professor of Medicine, and the Rev. HENRY DAVID HILL, Professor of Greek : all in said College,	}	<i>Respon</i>

House of Lords, 26th May 1809.

COLLEGE—ELECTION OF PROFESSOR — CASTING VOTE — I
PERSONA.—In the election of a Professor for the Chair
 tural Philosophy in the Colleges of St. Salvator and St. Len-
 of St. Andrew's, two candidates appeared, and were put in
 nation. Four Professors voted for Mr. Jackson, among wh
 the Principal of the College; and four voted for Mr. Mac
 the other candidate. Whether the one or the other was
 depended upon, Whether the Principal had both an c
 vote, and also a casting vote; or only a casting vote in
 equality? and, 2. Whether the vote given by Dr. Flint
 valid vote, he not having been duly admitted as a Professor
 that the Principal was not entitled to give two votes, bu
 a casting vote in the case of equality; and that Mr. Mac
 was duly elected Professor to the Chair. Reversed in the
 of Lords, and held that the Principal was entitled both to
 ginal and a casting vote in the case of equality, and, the
 that Mr. Jackson had been duly elected Professor.

This question arose out of a contested election for
 Chair of Natural Philosophy in the College of St. And
 vacant by the death of Dr. Rotheram. Two cand
 appeared,—one Mr. Thomas Jackson, of the Ayr Acad
 and the other, the Rev. Mr. Macdonald.

The election was in the Principal and Professors
 four voted for Mr. Jackson, consisting of the appe
 among whom was the Principal of the College; and
 voted for Mr. Macdonald, consisting of the responden
 There were two questions: 1. Whether Dr. Playfa

Principal of the College, had a right both to an original vote and also to a casting vote; or whether he had right to a casting vote only in the case of an equality of votes?

1809.

PLAYFAIR, &C.

v.

MACDONALD,
&C.

2. Whether Dr. Flint had any title to the Professorship under which he claimed the right to vote; and whether he had been duly admitted as Professor?

If Dr. Playfair had an original, and also a casting vote, Mr. Jackson was duly elected; if he had only an original vote, and if the vote of Dr. Flint be sustained, neither candidate was duly elected. But if Dr. Flint's vote was bad, and the Principal's elective vote good, then Mr. Jackson was duly elected; if both these votes were bad, in that case the election was decided by the Principal's casting vote, and Mr. Jackson was elected; and if the Principal had no casting vote, then the election was undecided.

A suspension and interdict was brought to try the first question, as to the precise nature of Dr. Playfair's right to vote. This question depended upon the original constitution and foundation of the College, from which it appeared,—That the separate Colleges are now combined by act of Parliament.

The College of St. Salvator was founded by Bishop Kennedy in 1458, consisted originally of thirteen persons, three Graduates in Divinity, (a Provost or Principal), a Licentiate, and a Bachelor, four Masters of Arts, and six Scholars. The management of the whole affairs, and the nomination of all the inferior members of the society, were lodged exclusively in the three Graduates in Divinity. The foundation charter expressly says: "*Cæterorum enim quatuor artis Magistrorum et sex Scholarium assumptionem, electionem, impositionem et remotionem eorundem ex causis præfatis seu alijs quibuscunque rationabilibus ad præfatos Præpositum Licentiatum et Buccalaureum tantummodo volumus pertinere:*" and, by a subsequent part of the same charter, it is provided that, in case any one of these three electors was absent, or disqualified from acting, his place should be supplied by the Rector of the University, or a person specially deputed by the University for that purpose. It was alleged by the appellants, that, from this constitution of the College, the Principal, or *Præpositus*, was, at the very least, vested with an *original elective voice*, in the same manner as the other two electors.

The present Professors sprung from the "*regentes in artibus*," whose original situation is thus described: "*Ac duo ad minus habiliores de præfatis artium Magistris, per dictos Præpositum, Licentiatum et Buccalaureum annua-*

1809. "tim sunt eligendi, qui Logicam, Physicam, Philosophiam
 "aut Metaphysicam, legere, et exercere astringantur." I
 PLAYFAIR, &c. thus appears by the original condition of the Professors in
 v. this College, they were to be elected annually by the Prin-
 MACDONALD, cipal, Licentiate, and Bachelor.
 &c.

On the suppression of Popery, and abolition of Episcopacy, and consequent dilapidation of the funds of the University, a variety of changes took place: The offices of Licentiate and Bachelor were suppressed, and the powers and privileges of the three Graduates came to centre in the Principal. At this time the Principal claimed the *sole* right of supplying any vacancies, but this being disputed by the Regents, who gradually became Professors, it was made a question in the Court of Session in 1707, on the contested election of a Professor of Greek to St. Salvator's College and the Court found "that the right of election of Master or Professors, in St. Salvator's College of St. Andrew's doth not belong to the Provost (Principal) alone, but *him in conjunction* with the Masters of that College."

Although this decision fixed the right of the other Professors to have a voice in the election beyond all dispute, was also conceived to fix that the Principal had an original right to vote in conjunction with them.

Again, with reference to St. Leonard's College, which was founded by Hepburn, Prior of St. Andrew's, in 1512, in the "*Statuta Collegii*" containing the rules of the Foundation, it is declared by the charter, that the Principal should have the care or management of the whole College ("*Curam gerere totius Collegii.*")

It had the following clause in regard to the Regents of Arts, who gradually grew up to be Professors, and their mode of appointment, "*Regentes vero quatuor sint in numero, aut pauciores secundum loci facultates ferre poterint, et Magister Principalis judicaverit expedire. Vero ad regendi officium instituentur ac recipientur per Dominum Priorem, et Collegii pro tempore existentem Magistrum Principalem.*"

The appellant contended, on the construction of this clause, that the meaning was, that the Regents were to be appointed by the Principal; and "instituted and received" or inducted by the Prior and him jointly.

On the Reformation, the Archbishop of St. Andrew's succeeded to, or assumed those rights which formerly belonged to the Prior; and two instances were on record, in which Archbishop Sharpe had filled up two vacancies with-

out the interference of the Principal, although that was very likely owing to the arbitrary and grasping character of this Prelate.

1809.

PLAYFAIR, &c.
v.
MACDONALD,
&c.

On the abolition of Episcopacy, the right of the Archbishop devolved on the Crown, who appointed the Principal; and it is certain that the Principal must have exercised the sole right of appointing the Regents for some time, because, in 1709, this right was made the subject of dispute, on his appointing Mr. Rymer, whereupon he obtained a grant from Queen Anne confirming the appointment, and declaring the right of election in the Prior and Principal jointly. The other Professors brought a reduction of the appointment, which action, after going on for some time, terminated in an agreement, whereby it was agreed that "The trial shall be before the Principal and Regents, concurring as judges therein; in which judgment the Principal votes *first*, if he pleases; and, withal, the side on which the Principal is shall preponderate, if *equal* in number to the other side."

The act of Parliament 1747, uniting the two Colleges, declared that the University of St. Andrew's "shall be under the management of the Principal (Magister principalis) and other Masters of the said United College in all time coming," &c. By sect. 9 it was farther enacted,— "That the four Professors of Greek and Philosophy in the said United College shall be elected and chosen by the Principal and Professors of the said United College, upon a comparative trial, in the same form and manner as the Professors of Greek and Philosophy were heretofore usually elected, by the Principals and Professors of the said Colleges of St. Salvator and St. Leonard's respectively."

By the terms of this act, the appellant averred that the elective franchise was conferred on the Principal, and that there was nothing in the statute to countenance the supposition that he was to be restricted to a casting vote in the case of equality only. This construction, he averred, was supported by the practice of giving *first* an original vote; and, if circumstances called for it, also a casting vote; and several cases of appointment were referred to.

But, on the other hand, it was averred on the other side, that in 1781, so conscious was Principal Watson that he could not support this right, that he gave up the right to a double vote at a College meeting, stating, "that the grounds of this claim

1808. (i. e. to a double vote) were insufficient to support it, and,
 PLAYFAIR, &c. " therefore, his present resolution is henceforth to continue
 v. " the practice of voting first, and to rest satisfied with the cast-
 MACDONALD, " ing vote." The respondents maintained that this was a
 &c. formal Act of the Society or College, reducible only by the
 judgment of a superior court, and binding, until so reduced,
 on all subsequent Professors.

Jan. 21, 1807. The Lords, upon the report of Lord Glenlee, pronounced
 this interlocutor: " Find that the Principal of the United
 " College of St. Salvator and St. Leonard, of St. Andrew's,
 " is not entitled to give two votes, but only to give a cast-
 " ing vote, in case of equality; find that the Rev. James
 " Macdonald was duly and legally elected Professor of
 " Natural Philosophy in place of the deceased Dr. John Ro-
 " theram, and therefore suspend the letters simpliciter. -
 " and continue the interdict in so far as regards Thomas
 " Jackson's admission, but recall the interdict as to James Mac-
 " donald's admission, and decern; and find no expenses due to
 " either party, and that the same are not to be stated again
 " the funds of the College, but defrayed by the parties
 " from their own private funds."*

Against this and the previous interlocutor of the Lord
 Ordinary the present appeal was brought.

Pleaded for the Appellants.—In the election in question,
 Professor Playfair had a clear right to give an original
 elective vote, as well as a casting vote in the case of equali-

* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said:—" This is a question of an
 election of a Professor, in the United Colleges of St. Salvator and
 St. Leonard's, in St. Andrew's. The *persona dignior*, or presiding
 member, seldom has a double vote; (Vide M'Laurin's Law Points,
 p. 76.) In general, he has only a voice in case of equality. This is
 the case in the election of the Chandos Professor of Medicine in that
 University. Vide Arnot v. Hill, 3d July 1804, (previous appeal.)
 The presiding member is supposed to have sufficient influence in every
 question by his pre-eminence and dignity, and the powers of reason-
 ing which he may exercise, without adding to his weight the mechan-
 ical power of voting as an ordinary member. Accordingly, this is only
 allowed where it has either been so provided by positive constitution,
 or by established practice. Neither of these occur here. On the con-
 trary, Principal Watson, after making the claim, gave it up. Were
 the Rector to be called in as presiding officer, to give a casting vote,
 this would not mend the matter; for he, though still *dignior persona*

ty; and this right is clearly supported and deducible from the original foundation of the Colleges—from the acts of Parliament, and from the whole circumstances above set forth; and his vote therefore, as given for Mr. Jackson, ought to have been received and counted; and the electors interested for Mr. Macdodald did wrong in refusing to receive and reckon the vote so given by him in favour of Mr. Jackson. They further did wrong in counting the vote of Dr. James Flint, because he not having been duly elected Chandos Professor of Medicine, nor duly inducted into the United College, and his right to the office being in discussion, at the period of the election in question, in the Court of Session, the vote tendered by him for Mr. Macdonald ought not to have been received or counted. But even supposing the vote of Dr. Flint a good vote, still the casting

1809.

PLAYFAIR, &C.
v.
MACDONALD,
&C.

at the meeting, would just be in the same state if the members, including him, should happen to be equal. (Vide Dalrymple v. Ker, 2d March 1762, unreported.)

"As to the second point, I think Flint's vote clearly good. The interdict against him is recalled, because his re-election was held good, till it should be reduced. The suspension is only passed to try the merits in a shorter way than by reduction, but has never gone further, and, in the meantime, he is in possession. See the acts instituting this Court, where the President is mentioned as a constituent member of the Court, and yet, being in the Chair, he can only have a casting vote, but has no ordinary vote. If the Chancellor were in the Chair, the President would then have an ordinary vote."

LORD WOODHOUSELEE.—"In my opinion the Principal has an original vote; and, if equal, he is entitled to a casting vote; and the foundations of both the Colleges prove this. It is the same in cases of Court Martial."

LORD HERMAND—"I am of the contrary opinion. In the Commissary Court of Edinburgh there is no double vote. This is founded on the common law."

LORD MEADOWBANK.—"I think that Flint was entitled to vote; but it is founded on common sense that the *dignior persona* must have a preponderance, and therefore a double vote."

LORD JUSTICE CLERK (HOPE).—"I think there is no double vote; and that nothing but statute or inveterate custom can bestow this."

LORD ARMADALE—"I am of the same opinion."

LORD CRAIG.—"I rather think he has two votes, or he has none at all."

President Campbell's Session Papers, (Jan., Feb., Mar., 1805.)

1809. vote given by Principal Playfair, together with his original or elective vote, decided the election in favour of Mr. JACKSON, who was thus duly elected Professor of Natural Philosophy in the United Colleges of St. Andrew's.

PLAYFAIR, &c.
v.
MACDONALD,
&c.

Pleaded for the Respondents.—By the common law of Scotland, the president of every public body exercises his right to vote, in the qualified form of a casting vote, and in no case whatever has a right to a double vote, except in virtue of special constitution or positive statute. This qualification of the right of voting is a necessary consequence of the office of President, and is more than compensated by the influence belonging to that situation.

By the respective foundations of St. Salvator and St. Leonard's, the Principal, or Præpositus, is not invested with a double vote, neither is this extensive and extraordinary privilege conferred by the act of Union. By the uninterrupted and invariable practice previous to the union of the Colleges, as well as subsequent to that period, the Principal has never exercised a right to more than a single casting vote. And, by a solemn resolution or bye law, passed by the members of the College in the year 1780, it was finally settled, that the right to a double vote, now claimed by the appellants, as it was neither granted by the charters, nor sanctioned by the practice of the College, did not belong to the Principal.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,—

“My Lords,

“This is the first in order of two appeals from the University of St. Andrew's in Scotland, which stand for decision before your Lordships.

“(Here his Lordship stated the names of the parties, appellants and respondents, and read the interlocutors appealed against from the printed cases).

“The cause arose out of the contested election of a Professor of Natural Philosophy in the United College of St. Andrew's. This election took place on the 1st of December 1804. There were two candidates for the vacant chair, Mr. Thomas Jackson, a gentleman who is mentioned to have taught in the University of Glasgow; and the Rev. James Macdonald, who, by the proceedings had at the election, having been declared the successful candidate, comes here as one of the respondents.

“At the election, a question arose, If Dr. James Flint, then appearing as Chandos Professor of Medicine, had been properly elected into that situation, in a recent election along with his son;

and, farther, granting that his election had been good, *whether he was truly in possession of his office, by not having been duly inducted in the same ?* 1809.

PLAYFAIR, &c.
v.
MACDONALD,
&c.

"When the question was put in the election, the appellants, who were four in number, voted for Mr. Jackson. The four respondents, who claimed to vote in the election, voted for Mr. Macdonald ; and Dr. Playfair, the Principal of the United College, in case the votes should be found to be equal, tendered his casting vote for Mr. Jackson. He had previously given an original vote, and, as four electors voted for Mr. Macdonald, and only three (exclusive of the Principal) for Mr. Jackson, the Principal was entitled to vote in the election.

"The action was thereupon brought, in which the interlocutors were pronounced which I have read to your Lordships. Upon these the appeal was brought here.

"In this cause, the appellants contended, 1. That Dr. Playfair had both an original and a casting vote. 2. That Dr. Flint was not duly elected ; and, 3d. That he was not duly inducted. The effect of the judgment of the Court below was to find that Dr. Flint's title to vote was good, both on his original right, and on the induction ; and that Dr. Playfair had no right to an original vote.

(Here his Lordship, from the second page of the appeal case, 2d paragraph for the appellant, read the different views of this election, as it would be operated on, in case of any alteration of the judgment).

"In this case, and in the other which is connected with it, I have endeavoured to scrutinize my own opinion, and get rid of every thing like prejudice upon these questions. An English lawyer, in such matters, is in some danger of misleading himself. Of the many doctrines that are stated to be clear law in cases of election in Scotland, a good many are exactly the converse of our law in this country upon similar points."

"The question here lies in a narrow compass. It was said to be reasonable that the Principal should have both an original and a casting vote. On the other side, this was denied. These positions were illustrated on the one side and on the other by arguments drawn from the practice of Church judicatories ; of the Universities in Scotland ; of the Court of Session ; of meetings of freeholders ; and of other corporations, and of elective bodies throughout Scotland.

"But, in this case, whatever may be the general law in Scotland as to the rules of proceeding in such meetings, it is impossible to apply such law by analogy to govern the present case. This case is to be regulated by an act of Parliament, passed in 1747, which I am about to state ; if no facts appeared as to the modes of proceeding in election in the two Colleges before this act which united them was passed, arguments might be properly used from the general law, as evidence of the fact upon this question ; but if such facts

1809. do actually appear, there is no room for such an application of general law in this case.

PLAYFAIR, &c. v. MACDONALD, &c. “ In the statute of 1747, the two Colleges of St. Salvator and Leonard were united into one, and all the lands and property the two ancient Colleges, embracing their rights of patronage, declared to belong to the United College. The two Colleges had formerly consisted of a Principal and five Professors; these were reduced one half in number, and two Professors of the University, the Professor of Mathematics and the Professor of Medicine, added to the United College. Thus, after the act, the United College consisted of a Principal and seven Professors.

“ With regard to the election of the Professors of the United College, it is enacted in the statute, sec. 9, ‘ That they shall be elected and chosen by the Principal and Professors of the said United College, upon a comparative trial, in the same form and manner as Professors of Greek and Philosophy were heretofore usually elected by the Principal and Professors of the said Colleges of St. Salvator and St. Leonard’s respectively.’

“ Having read this clause, I draw this from it, as matter of inference, that the question of this day is to be decided as if it occurred within one month after the passing of the act; and that it cannot be ruled by any subsequent proceedings of Principal Telford, Principal Watson, or others. It is also quite clear, that the statute considered the mode of election to have been the same in both Colleges before this act was passed for uniting them. If the facts given in evidence instruct that the Principals in the two Colleges had only casting votes before the date of the act of Parliament, then the transactions afterwards are important to show that this was then understood. If these Principals, before the date of the act, had both original and casting votes, it is clear that the Principal of the United College has both now.

“ To see how it should have been decided in 1748, we must look at the history of the two Colleges before their union. The University consists in all of three Colleges; the two which have been already mentioned, and the College of St. Mary. The mode of election in St. Mary’s College has also been the subject of discussion, but here, as already noticed, we have no room for analogy. We must look to the act of Parliament.

“ The College of St. Salvator was founded in 1458. It consisted originally of thirteen persons, three Graduates in Divinity, the Rector, Licentiate, and Bachelor, four Master of Arts, and six Scholars. The mode of election by the statutes of foundation, in case of a vacancy among the Graduates in Divinity, is declared to be by two surviving Graduates and the Rector of the University, *aut duos eorum*. (Here his Lordship read the words, as stated in Pringle’s book). Upon these words, *aut duos eorum*, I do not conceive there could be any difference of opinion between the law

of Scotland and of this country. It is impossible to say, that under these words, one of the three electors could in any view be said to have had no vote at all.

1809.

PLAYFAIR, &c.
v.
MACDONALD,
&c.

"As to the appointment of the four Masters and six Scholars, the words are—(Here his Lordship read the same). There is nothing here to preclude the original vote of the Provost or Principal; it belonged to him and the other two Licentiates to elect. From the words used, it was to be inferred, that they were all upon equal footing as to the original vote.

"As to the present Professors, I agree with what is stated in the appellants' case, that they appear to have sprung from the Regents in Arts. These were to be chosen, '*per dicta Præpositum Licentiatum et Buccalaureum*,' without calling in any third elector. If the Provost in those days had no original vote, in the absence of the others, there could have been no election.

"After the changes in this College which followed upon the Reformation, a contested election of a Professor of Greek occurred about the beginning of last century. The Principal voted for Mr. Rymer, two of the Professors for a Mr. Haldane. The third was *non liquet*. This election having been brought in question before the Court of Session, that Court, in 1707, found that the right of election did not belong to the Provost alone, 'but to him in conjunction with the Masters of the College.' They also found it 'proven, that the said Mr. James Haldane, at the time of the election, had the plurality 'of voices,' &c.

"It appears from this judgment that the Principal claimed the sole right of patronage; this the Court found he was not entitled to. On the part of the respondents, it was contended, on the subject of this judgment, that the Principal had no original vote. This they affected to collect from the words of the judgment, that the right of election did not belong to *him alone*; but to him in conjunction with the Masters of the College. This might mean, either that the Principal might vote along with them, or that he had no original vote; or that he had both an original and a casting vote. The respondents contended, that it appeared from this judgment, that the Principal had only a casting vote; but it is quite clear that the judgment, on the contrary, shows that the Principal had an original vote. It is to be recollected, that in the election then, the Principal gave his single vote for Mr. Rymer, and the other two of the Professors gave their votes for Mr. Haldane. When the Court found it proved that Mr. Haldane had the *plurality* of voices, it is quite clear that they held the Principal's original vote to be a good vote. With regard to his casting vote, there was no opportunity here to decide as to this; but there is nothing in this decision exclusive of the Principal's casting vote.

"The College of St Leonard's was founded at a later period, in 1512. The mode of appointment of the Regents in Arts, who have

1809. gradually grown up to be Professors, is in these words, 'Regentes
 'vero,' &c. (Here his Lordship read the same, from the third page
 of the appellants' case.)

PLATFAIR, &c.
 v.
 MACDONALD,
 &c.

"At different periods, controversies appear to have occurred, with regard to this clause, in the statutes of foundation, but, in such controversies, the Professors do not appear to have taken any part till 1709. About this period, it appears that Principal Drew instituted, and admitted a Mr. Rymer to be one of the Professors of the College, upon his own authority alone. His right to do so having been challenged by the Professors, mutual actions were brought by those parties, to have the matter decided in the Court of Session. But the matters in dispute were settled by an agreement in 1710, which, in so far as it respects the election of Professors, is in the following words,—'That the trial shall be before the Principal and Regents, concurring as judges therein; in which judgment the Principal votes first, if he pleases, and withal, the side on which the Principal is, shall preponderate, if equal in number to the other side.'

"Principal Drew continued in his office till his death in 1738. It is stated, that an election of a Professor Young took place in 1716, in the mode pointed out by that agreement. Principal Drew was succeeded by Principal Tullidolph, and it is stated that no election occurred in his time, till the act of Parliament was passed in Scotland for uniting the Colleges.

"It was strongly pressed on the part of the respondents, that the agreement was only to subsist as long as the parties contractors remained in their offices; but it was not stated that any practice of a nature contrary to this agreement had obtained in this College before the act of Parliament was passed.

"I take it therefore to stand thus: that we see that, in 1707, a judgment was pronounced by the Court of Session, recognizing an original vote in the Principal of St Salvator's College; and that in St Leonard's College it was recognized by the agreement in 1710, that the Principal had an original vote. Then we come to the act of Parliament in 1747, which enacts, that in all time to come, the Professors shall be elected and chosen by the Principal and Professors of the United College, in the 'same form and manner as the Professors of Greek and Philosophy were heretofore usually elected, by the Principals and Professors of the said Colleges of St. Salvator and St. Leonard's respectively.'

"The act of Parliament thus considered the usage in both Colleges to be the same; and if we see clearly, that the usage in one College was to give the Principal an original vote, and in the other, an original and preponderating vote; how is it possible to extract from the statute any other conclusion than this, that the Principal of the United College was to have an original, and a casting, and a preponderating vote, in time to come?

"It is proper to notice here, that the statute does not refer to the

ancient practice upon this subject, but to the form '*heretofore* 1809.
'*usual*' in the two Colleges. The statute thus appears to adopt the
judgment in 1707. And the agreement of 1710, as the rule to be PLAYFAIR, &C.
observed in future. v.
MACDONALD,
&c.

"As I see your Lordships are anxious to proceed to other business, I hasten through the remainder of the cause. Whatever future arrangements parties might think proper to make, it is the statute that must be the rule in this case; at sametime, it appears that Principal Tullidolph asserted his right to the double vote.

"But the Court of Session say, that this matter was settled by a bye law in 1781, by consent of Principal Watson. I have looked into this paper, but can see nothing in it that resembles a bye-law. It was not in the power of these parties to do any thing contrary to the act of Parliament, which should bind their successors. Whatever was the opinion of Principal Watson as to what was fit or not fit for him to do, this is nothing to your Lordships. You are bound to look to the statute for the rule that is to govern.

"But I see, even in the terms of this transaction, the strongest evidence of former practice. Principal Watson says, 'that his present resolution is, henceforth to discontinue the practice of voting first, and to rest satisfied with the casting vote.'

"I will not delay the House by going through all that was stated upon the general law of Scotland in matters of election, and the particular instances that were cited to us upon this subject. The case, as I have already said, in my opinion, stands upon the usual practice before 1747, which was adopted in the statute.

"With regard to the casting vote, I had at one time some difficulty, and thought it might be expedient to have remitted this to the Court for further consideration. But, upon this point, there is no appeal, the Court has given the Principal a casting vote, and the judgment is acquiesced in. I am so satisfied also upon this subject, that I do not see it necessary to protract the litigation by any remit thereon. I therefore move as follows :—

It was ordered and adjudged that the finding in the interlocutor of the 21st of January 1807, that the Principal of the United College of St. Salvator and St. Leonard's, of St. Andrew's, is not entitled to give two votes, but only a casting vote in case of equality, and the finding that the Reverend James Macdonald was duly and legally elected Professor of Natural Philosophy in the place of the deceased Dr. John Rotheram, be reversed; and the Lords find that the said Principal is entitled to give one original vote, and also a casting vote in case of equality; and further find, that the Principal having, in this case, given an original and casting vote in favour

1809.

FRANK
v.
FRANKS.

of Mr. Thomas Jackson, it is unnecessary to determine whether the objections to the vote of Dr. Flint ought to be sustained. And further find, that Mr. Thomas Jackson was duly and legally elected Professor of Natural Philosophy in the place of the said Dr. John Rotheram deceased. And it is further ordered and adjudged, that the case be remitted back to review the several interlocutors complained of, having due regard to these findings, and to give effect to the same.

For Appellants, *Sir Samuel Romilly, Henry Erskine.*

For Respondents, *Wm. Adam, Ad. Gillies, James Wedderburn*

NOTE.—Unreported in the Court of Session.

[Mor. Dict. 16824.]

WM. DANIEL ARTHUR FRANK of Deptford, }
only lawful Son of John Frank, who was } *Appellant* ;
the lawful Son of William Frank of }
Bughtrig, in the County of Berwick, }
JAMES FRANK and WM. FRANK, . *Respondents—*

House of Lords, 10th June 1809.

REDUCTION OF DEEDS—INCAPACITY—FRAUD—PROOF—INSTRUMENTARY WITNESSES, ADMISSIBILITY OF—DISQUALIFICATION FROM INTEREST—EXECUTION OF DEED.—Circumstances in which the following points were decided, and affirmed in the House of Lords—1. That the granter of the deed was of a sound disposing mind at the time he executed the settlement challenged. 2. That the instrumental witnesses were competent witnesses for the pursuer; reserving all objections to their credibility. 3. That the deed fell to be sustained as regularly executed, although one of the witnesses *ex intervallo* deposed that he did not see the granter subscribe, or hear him acknowledge his subscription. 4. That the act, nor the practice under the act, did not require that the witnesses should exhibit their subscriptions in the same room with, and in the presence of the granter. 5. That a party, in whose favour a bond of annuity was at same time executed, was an incompetent witness for the defender, on the ground of interest.

Charles Frank held the estate of Bughtrig, under a deed executed by his father, containing a simple destination to a

certain series of heirs, without any prohibition against altering the course or order of succession.

After his father's death, Charles succeeded as eldest son called under the deed. His father left other sons, John, (the father of the appellant), Robert, James and William, his brothers, and two daughters.

Charles, the eldest, was not born in wedlock, but was legitimated by the subsequent marriage of his parents. His other brothers and sisters were born in lawful wedlock.

In consequence of some attempts made on the part of his younger brothers to question his right to succeed to the estate, on this account his feelings had been estranged from them, and he accordingly altered the destination contained in his father's settlement in favour of his brother James, and the heirs of his body, whom failing, to Ensign James Wright, a grandson of his father's eldest sister; whom failing, to Colonel Brown, and passing over the family of his brother John, and his other brothers and sisters.

At the time he executed this deed he was much given to Feb. 8, 1791. habits of indolence and intemperance, and from these his health had been made precarious, and his temper somewhat peculiar and uneven.

It was in these circumstances he employed a writer, of respectable standing in Dunse (Mr. Turnbull), and gave him directions to make out a settlement as above described, and a bond of annuity to his maid servant, Janet Smith, and they were duly and regularly executed in the presence of Joseph Brown, his principal tenant, and James Tod, a labouring servant, called in to witness and attest the execution of the deeds. He survived the execution of these deeds for a period of three months, and died on 17th May 1791.

The appellant raised the present action of reduction to set aside the settlement so executed, on the following grounds: 1st. That it was false, forged, vitiated and erased in *substantialibus*. 2d. That it proceeded upon a false narrative, and was subscribed by a person who had no power to grant it. 3d. That Charles Frank's father had executed a destination of succession to his estate, in which the pursuer (the appellant), his grandson, was called immediately after his uncles, who had no title to alter the same to his prejudice. 4th. The settlement was granted without any just, necessary, or onerous cause, on the 8th February

1840.

FRANK
V.
FRANKS.

1809.

 FRANK
 v.
 FRANKS.

1791, while Charles Frank was on his deathbed, and labouring under the disease of which he died. 5th. The said signation and settlement alleged to have been granted by the said deceased Charles Frank on the 8th of February 1791 was not subscribed by him before the witnesses there mentioned, nor did they see him adhibit his name thereto nor hear him acknowledge his subscription to the same; on the contrary, they were ordered to go out of the room while he is said to have subscribed it, whereby it is *funditus* void and null, &c. 6th. The said settlement or other deed was elicited and impetrated by the defenders or others through gross fraud and circumvention, and to the pursuer's hurt and lesion. 7th. At the time the said settlement was executed, Charles Frank was in a state of weakness and imbecility, incapable of knowing what he was about, and easily circumvented and imposed upon.

In a condescendence, these several grounds were restricted to two, the fifth and seventh; namely, 1st. As to the execution of the deed before the witnesses; and, 2d. As to weakness and imbecility of the grantor.

A proof was allowed on these heads, in the course of which the pursuer (appellant) tendered the instrumentary witnesses, in order to prove that they were not present when Mr. Frank signed the deed, and that they did not hear him acknowledge his subscription. To this it was objected, 1st. That, to admit such evidence, was to admit perjury to contradict writing, and the most important of all writings, the execution of a deed which is a judicial act. 2d. That it was also incompetent, because, by the act 1681, c. 5, it was declared, "That no witness shall subscribe as witness to any party's subscription unless he then know the party, and saw him subscribe, or saw or heard him give warrant to a notary or notaries to subscribe for him, and be in evidence thereof, touch the notaries' pen; or that the party did, at the time of the witnesses subscribing, acknowledge his subscription, otherwise the said witnesses shall be reputed and punished as accessary to forgery."

The Lord Ordinary thought this question of so much importance as to report it to the Court. The Lords, of this date, pronounced this interlocutor: "Having advised the foregoing minutes of debate, and heard parties procurators thereon, they repel the objections stated to the examination of the instrumentary witnesses, and allow

“ them to be examined accordingly; reserving all objections
“ to the credibility of their depositions as accords ”*

1809.

The proof proceeded, and the instrumentary witnesses were examined.

FRANK
v.
FRANKS.

Janet Smith, in whose favour the bond of annuity had been granted, was tendered by the defenders as a witness; but the Court, on objection, disallowed her to be examined, on the ground of interest.

When the proof was finally concluded the Court pronounced this interlocutor:—“ The Lords having advised Dec. 2, 1794.
“ this cause, libel, defences, writings produced, and proof
“ adduced, and whole procedure, and having heard parties
“ procurators thereon, repel the reasons of reduction, and

* Opinions of the Judges, (*upon the Proof tendered.*)

LORD PRESIDENT CAMPBELL said:—“ This question regards the admissibility of instrumentary witnesses to disprove the due execution of the deed. The question of credibility is very different from that of admissibility. In all cases of the kind, the instrumentary witnesses have uniformly been examined, see *Sibbald v. Sibbald*, 18th Jan. 1776, Mor. 16906; *Farmer v. Myles and Annan*, 25th June 1760, Mor. 16849; case of *Dr. Gibson v. Weir of Kirkwood*, Session Papers, vol. 40, No. 9, (unreported), case of *Hardie of Rosehall*, Session Papers, vol. 48, No. 16, (unreported); case of *Maxwell v. Mrs. Lowthian*, 3d July 1792, Mor. 16853. Even in England it appears from the case of *Goodtitle v. Clayton and others*, reported by Burrow, vol. iv. p. 2225, and in other cases there alluded to, the witnesses are uniformly examined. Their evidence may be necessary to make out fraud, force, incapacity, &c., and, with a view to these grounds of challenge, independent of the statutory objection, it is competent to ask, ‘ Did you see him? Were you present? What did he say?’ &c. It is admitted on all hands, that *non memini*, or even a dry negative unattended with circumstances, would be insufficient. It is of terrible consequence, says Lord Mansfield, ‘ that witnesses should be tampered with to deny their own attestations.’ ”

LORD JUSTICE CLERK (M^QUEEN).—“ If the party who executed the deed himself, were to bring the instrumentary witnesses to disprove it, there might be a personal exception. But the other party may adduce them. *Socii criminis* are admissible, though, if they please, they may object to swear in *suam turpitudinem*. ”

LORD CRAIG.—“ I am of same opinion. ”

LORD MONBODDO.—“ I am of same opinion. ”

LORD HENDERLAND.—“ I am of same opinion. ”

LORD ABERCROMBIE.—“ I am of same opinion. ”

1809.

FRANK
v.
FRANKS.

Mar. 3, 1795.

“assoilzie the defenders, and decern.”* On a reclaimi
petition, which was ordered to be answered, the Lords :
herod.

* Opinions of the Judges, (*upon the Merits.*)

LORD PRESIDENT CAMPBELL said :—“ Three different questio
arise, 1st. Alleged incapacity. As to this it is plain from the pr
that the granter lay under no incapacity, and was of a disposing mi
It is equally clear that no undue means were used in obtaining t
deed.

“ 2d. That the witnesses did not see him subscribe, or hear h
acknowledge his subscription. As to this the *onus probandi* l
on the pursuer. They have put their names to the deed, which
prima facie evidence that it was regularly done, and although,
doubt, there may be room for improbatory evidence, yet this must
very strong and decisive, as it would be very dangerous to cut do
deeds *ex facie* regular, upon doubtful or equivocal testimony, w
ther of instrumentary witnesses or others. So the Court thought
a late case, Steel, &c. 25th June 1794. (Unreported.)

“ Every legal presumption is for authenticity, and it has even bee
doubted whether instrumentary witnesses can be at all admitted, t
give evidence contrary to their attestation. See the argument i
the minutes of debate. In the case of Baillie v. Baillie (unreport
ed), which was compromised, the evidence was very strong and con
clusive, see Session Papers, vol. 48, No. 26. That of Brown v.
Chalmers (unreported) was a case of incapacity and undue influence,
&c., Session Papers, vol. 48, No. 78. The case of Farmers v. Myles,
&c., 25th June 1760, (Mor. 16849), was not well decided, the proof
was there of a doubtful nature, and the Court ought to have sustained
the deed. The case was not well argued. In a late case, Scoon v.
Scoon, 18th Feb. 1792, (unreported), the Court sustained an exe
cution, although the witnesses swore that they did not see the copy
actually delivered, being at the distance of some yards, and without
the wall of the house ; but as it clearly appeared that the witness
were near at hand, and nothing unfair was intended, the Court
thought it would be dangerous to give way to their evidence *ex post*
facto, contrary to the attestation, when it was possible that they had
no distinct remembrance of the fact, or perhaps did not give much
attention to it at the time.

“ In the present case, the witnesses having been sent for purpose
ly, and actually introduced into the room, it is incredible that the
should have been instantly dismissed, without waiting a few minute
till the business was done ; and if they were in the room, and had a
opportunity of seeing what was going on, which they have accord
ingly attested under their hands, and have also proved by Turnbu

Against these interlocutors the present appeal was brought to the House of Lords by the pursuer.

1809.

Pleaded for the Appellant.—1st. At the time when the deed under challenge was executed, as well as for some

FRANK
v.
FRANKS.

the writer, and in part by one of the witnesses themselves, it would be very dangerous to cut down the deed upon the negative testimony of the other witness, who may have been tampered with since, and evidently exaggerates in some of the circumstances.

"3d Point. That the instrumentary witnesses adhibited their subscription in another room, and not in the presence of the party. This is a statutory requisite in England, by § 5 of the statute of Frauds, 25 Charles II. cap. 3. But there is no such clause in the act 1681. The case there mentioned in Bacon's Abridgment, vol. v. p. 509, does not apply to our practice. The words, 'at the time of the witnesses subscribing,' in the act 1681, are introduced into that part of the clause only which relates to the acknowledging the subscription. If they have not seen the party subscribe, they ought, when called in to sign as witnesses, to hear him acknowledge his subscription; but if they have actually seen him put his name to the paper, they cannot make any doubt of the fact; and even if the words 'at the time of,' &c. should be considered as applying to both cases, it would be a very strict and judaical construction of the act, to hold, that if either the party himself should happen to walk into the next room, or if the witnesses should happen to do so, before adhibiting their names, the whole transaction must fall to the ground. The act does not mean that it should all be done *unico contextu*, the party and witnesses being in presence of one another, and never losing sight of the paper for a moment; nor has any such rule been understood in practice; for it very often happens that there are two or more parties to a writing, such as a mutual contract, and the writer who is entrusted with the formal part of the execution, sends perhaps two of his clerks, first to one party, and then to another, to see them adhibit their subscriptions, and then the witnesses sign their names, perhaps in presence of the last subscriber only, or perhaps in presence of neither; and last of all, the testing clause is filled up.

"It is true, there ought to be no great interval of time and place; and it is a circumstance to be attended to, in a charge of fraudulent or collusive dealing, that the witnesses and parties have lost sight of one another, before the business is fully completed; but not being of the nature of a statutory solemnity, it is one of those extrinsic circumstances which will have its effect, along with others, in a case depending on evidence, but will not *per se* be conclusive.

"No testing clause ever bore that the party saw the witnesses

1809.

FRANK
v.
FRANKS.

time before and after that date, Charles Frank, the testator, who during his whole life had been a person of a most irregular and eccentric character, evidently tending to derangement, was not in a state of sound mind, and that the proof adduced, establishes this. This deed, likewise, was contrived and executed in circumstances peculiarly suspicious. For a year and a half at least preceding its date, the testator Frank, was entirely secluded from the presence and society of all his relations, and of almost every acquaintance of his own rank. He was surrounded merely by

subscribe, or that they subscribed in his presence ; and this shows that it is not an essential requisite.

“ The law of Scotland has abundance of checks against fraud in the execution of deeds, and there is little occasion for the introduction of more ; but if it be thought necessary to superadd any check of this kind, it ought to be done by special regulation, to have effect only in future, for the giving it a retrospect would make great havoc upon deeds and writings already executed, and therefore would be highly unjust.”

LORD ANKERVILLE.—“ As to the first question, namely, Incapacity, there is no sufficient evidence of it. But, 2d, I am of opinion that the legal solemnities have not been observed in this case. The witnesses did not see him subscribe, nor hear him acknowledge his subscription. 3d. Point.—I likewise think that this (witnesses subscribing the deed as such in another room) was an irregularity.”

LORD JUSTICE CLERK (M^QUEEN).—“ 1st. Point.—I think there was neither incapacity nor fraud here. 2d. Point is a more delicate question. To call a witness to combat his own handwriting or attestation, is open to many objections. After the lapse of time his memory may be frail. The witness may be tampered with. As to the third point, it is usual in practice ; and there is nothing in the act against it.”

LORD ESKGROVE.—“ 1st. Point.—No incapacity. 2d. Point.—The *onus probandi* lies with the objector ; but I think no sufficient evidence has been adduced,—Case of Steel.”

LORD SWINTON.—“ Turnbull, the agent, who wrote this deed, is a man of character. I agree as to the first two points. But my difficulty is as to the third point. There is no good reason for any interval here.”

LORD DREOHORN.—“ I doubt as to the insanity.”

LORD DUNSINNAN.—“ The statute, as to the last point, seems to support the opinion that they must be present at the time ; and perhaps inquiry should be made as to the practice on this subject.”

President Campbell's Session Papers, vol. 77.

mestic servants. During this period of his imbecility, net Smith, one of these servants, possessed over him an abounded influence, which she employed in gratifying her deep-rooted resentment against his whole family. She prevailed upon him to exclude them all, and their descendants, from the succession of his estate for ever, with the single exception of the original liferenter, who was not the heir at law, and who had been for many years resident in India. 2d. It was clearly ascertained by the evidence, positive and real, before stated, that James Tod, one of the instrumental witnesses, did not see, and could not have seen, Charles Frank, the testator, subscribe the deed under challenge; nor did he hear him acknowledge his subscription. The fact being thus established, the necessary conclusion is, that this deed must be declared irregular and improbate, and must be set aside under the authority of the statute of the Parliament of Scotland in the year 1681, c. 5, already cited. Nor can it be a subject of regret that the deed thus exposed to a statutory objection, should be declared void, because the result will be, only to open the succession to the heir at law, who, according to the expression of Lord Raymond, "is favoured in all courts." Besides, in this case, the heir at law was the person intended by the testator himself—an intention often declared by him to others for many years before his death. Instead of which intention taking place, (in consequence of the death of James Frank during the dependence of this cause), the estate must now go to mere strangers.

Pleaded for the Respondents.—1. Because it appears from the evidence that the deed now in question contained such a destination of the estate of the deceased as he had long contemplated; that he was of sound and disposing mind when he gave instructions for the execution of this deed; and that those instructions were the spontaneous dictates of his own mind, and not brought about by the importunity, solicitation, or suggestion of any person whatever. 2. Because the deed prepared in consequence of these instructions, was duly executed by the granter when of a sound and disposing mind; and, 3d, It was duly attested by the subscribing witnesses, with all those forms and solemnities which the law of Scotland requires in such cases.

After hearing counsel, it was

1809.

FRANK
v.
FRANKS.

1810. Ordered and adjudged that the interlocutors complain
of be, and the same are hereby affirmed.

GORDON, &c.
v.
TOUGH.

For the Appellant, *Henry Erskine, Wm. Erskine,*
Fleto

For the Respondents, *Sir Samuel Romilly, Jos*
Muri

CATHERINE GORDON, Spouse of WALTER
STUART, Excise Officer at Cairnton (a } *Appellants*
Pauper), and him for his interest,

AGNES TOUGH, Widow and Disponee of }
WILLIAM GORDON, deceased, in Links of } *Responden*
Arduthie, near Stonehaven,

House of Lords, 13th Feb. 1810.

TRUST—PROOF—PAROLE.—ACT 1696, c. 25.—Circumstances
which a trust was allowed to be proved by facts and circumstance
and the correspondence of the parties, in regard to a lease gran
to the trustee *ex facie* absolute. Affirmed in the House
Lords.

The farm of Arduthy was let on a long lease to Je
Tough, and, several years thereafter, he subset to the
spondent's husband, the deceased William Gordon, the
parts of the farm called the Bog of Arduthy, the Mu
the Whiteley, and the Puttieshole. Mr. William Gori
did not obtain possession of the whole of this farm
one time, a small part of it, for which he was to pay
yearly rent of £8, was let to him in the year 1781; s
another part, called the Muir of Arduthy, was set to l
Gordon, by a missive, at the rent of £11. 4s. for a period
47 years from Martinmas 1783. Thus the total rent wh
Mr. Gordon was to pay to Mr. Tough was to be £19.
annually, for a very long lease of the lands.

In the year 1784, finding that particular business would r
der it necessary to go to London, and leave Scotland for sever
years, Mr. Gordon arranged his lease matters so that, in
absence, no attempt should be made to carry off his property
payment of debt which he was owing, and, to carry out his vie
he resolved, as was alleged by the respondent, but denied by

appellant, to make over the lease in trust to the appellant, his sister, who lived in family with him at the time. But instead of assigning the lease in trust to her, or conveying it absolutely, with a back bond declaring the trust, it appeared that he adopted the plan of getting the old lease cancelled, and a new one made out in favour of his sister, for the same rent.

1810.
GORDON, &c.
v.
TOUGH.

In these circumstances, the question was, Whether William Gordon's sister (appellant) held this lease in trust for her brother, or absolutely, and on her own account; or whether it belonged to the respondent, the deceased's widow, and general disponent?

To try this question, the appellant brought a process of removing against the respondents before the Sheriff, three years after William Gordon's return from London; and the Sheriff having decerned in the removing against William Gordon, an advocacy was brought, and a declarator at same time by the respondent's husband.

It appeared, on investigating the circumstances, that William Gordon had not gone to London immediately after this transaction, but continued on the farm for two or three years, managing it as formerly, and deriving all the profits of it, he paying the rent to his landlord, and obtaining receipts in his own name. And after he went to London, where he resided for several years, he still continued to correspond with his sister, and from time to time to give directions concerning the farm; had part of the produce sent to him; and it appeared from the correspondence between them, that Mr. Gordon, and not his sister, was the true tenant of the farm. After his return from London to his native country, he again resumed possession and the management of the farm, his sister living as formerly with him, who never for once thought of disputing his right thereto; and it was not until after the appellant's marriage to Walter Stuart that she ever formed any idea of making such a claim against the respondent's husband.

In this shape the whole question came before Lord Glenlee, Ordinary, and, after a variety of discussion and procedure before him, his Lordship took the cause to report to the whole Lords, and appointed the parties to prepare mutual informations to be lodged to and advised by the Court.

The Lords pronounced this interlocutor:—"Upon report Dec. 10, 1800. of Lord Glenlee, and having advised the mutual informa-

1810. " tions for the parties in this cause, the Lords remit to th
 " Lord Ordinary to take the judicial examinations of th
 GORDON, &c. " parties, upon all facts and circumstances relative to th
 v. " matters at issue, and also to ordain a production of a
 TOUGH. " discharges of rent and other writings tending to thro
 " light upon this transaction, and afterwards to do therei
 " as to his Lordship shall seem just."

The Lord Ordinary appointed a judicial examination o
 the parties to take place; and the parties having been ac
 cordingly examined, his Lordship ordered memorials on th
 whole cause.

The following was the declaration of the parties :—" Th
 " appellant recollects asking her brother for payment of th
 " different sums she had advanced for him, and for th
 " wages which she thought was due to her, with which d
 " mand he answered that he could not comply; but he sa
 " that he was going to take some additional land from Jo
 " Tough, and that, if the declarant liked to take the who
 " including the eight acres above mentioned, he would g
 " all up to her; and he desired her to take her cloak a
 " look at the ground, which John Tough would show
 " her; that she accordingly did so, and John Tough poin
 " ed out what was proposed to be given: That upon he
 " coming home she told her brother that the land wa
 " worth nothing; upon which he said he would make it
 " better for her; declares that no more passed at the time.
 " But some weeks thereafter, as she thinks, she saw Joh
 " Tough, who said to her, ' Miss Gordon, I think we are
 " going to get you as a tenant,' to which the declarant an
 " swered, that *she did not know*: That upon this Joh
 " Tough further said, that her brother had told him so, and
 " the reason of it; upon which the declarant asked what i
 " was that her brother had said was the reason for giving
 " her the lands? To which John Tough replied, that i
 " was for the money which she had given to her brother
 " and for the service in the family; declares, that sometim
 " after this the pursuer told the declarant that he woul
 " bring John Tough, and John Low the writer, to get th
 " tack made in her favour; and that this was accordin
 " done in March 1784. In regard to the stock, she declar
 " ed that what stock was on the farm the declarant too
 " possession of it, and no account or inventory was taken o
 " it, either at the time when the declarant got her lease, o
 " when the pursuer went to London, and at the time wher

"the pursuer mentioned any thing about the lease to be given to her, nothing at all was said about the stocking; and the stocking consisted of two horses, one of which was purchased for 15s., and a cow, an old cart, an old plough, and two old harrows."

1810.
GORDON, &c.
v.
TOUGH.

The letters of her brother from London, and her own in answer, seemed to contradict her declaration.

Upon these, and the facts and circumstances before mentioned, the Lord Ordinary pronounced this interlocutor:— June 30, 1801.

"Having resumed consideration of the whole proofs, the Ordinary is of opinion that the account which the defendant gives of the considerations for which she now alleges that the pursuer agreed to give up the subtacks held by him from Tough, and to allow a new subtack in 1784 to be taken in the defender's name for her sole behoof, is unsatisfactory in itself, and entirely inconsistent with what was stated by her in answer to the pursuer's condescendence, on advising which the interlocutor of 16th January 1798 was pronounced. She having in that paper denied all interference of the pursuer in the transaction by which she obtained the subtack from Tough, and having stated the claims which, at the period of that transaction, she had against the pursuer, not as she now does, to have been the consideration for which the pursuer resigned the lease in her favour; but as an offset or ground for compensation against that part of the libel which concludes against her to account for the stock left by him on the lands contained in the subtack; and also for the furniture and plenishing of an inn which had been kept by him, and which is a subject said to be altogether separate from the lands above mentioned contained in the above sub-tack; and the Ordinary is of opinion, that when the whole circumstances appearing from the declarations of the parties, and from their correspondence, are taken together, there is sufficient ground for holding that it was not intended that the subtack from Tough in 1784 should be a permanent right in the defender's person for her own behoof; but that, on the contrary, although no declaration of trust was granted, although the parties may not have formed any precise and accurate idea of their relative situation towards each other, and of their respective interests in the subject; yet it had been in the main understood, that when the pursuer's situation should admit of his being reinstated in the right of the tack, the defendant should

The respondent, William Gordon, died soon after the appeal was taken.

1810. "so reinstate him; and, on the whole matter, find the
 GORDON, & C. "upon the defender being satisfied and fully paid all his
 v. "claims which she can instruct she justly has against the
 TOUGH. "pursuer, she was and is bound to denude in his favor
 "and cede possession, and in so far in the ordinary action
 "repels the defences, and decerns; and with respect to the
 "extent of the defender's claims, and all matters of account
 "counting between the parties, declares he will bear the
 "farther; and finds that, in the meantime, and until she
 "appear that the defender has claims against the pursuer
 "which are not yet extinguished, the possession of the farm
 "ought to remain with the pursuer; and therefore, in the
 "advocation, advocates the cause, assoilzies from the
 "moving *hoc statu* and decerns, superseding extract till the
 "third sederunt day in November next." A representation
 Nov. 7, 1801. against this interlocutor was refused; and, on reclamation
 Jan. 12, 1802. petition to the Court, the Lords adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1. It is the undisputed law of Scotland, established by the act 1696, c. 25, and explained and confirmed, if it required explanation or additional strength, by a uniform series of decisions since that time, that a trust can only be proved by a written declaration or back bond of trust, lawfully subscribed by the person alleged to be trustee, or by the oath of the same party. This is laid down by all the institutional writers. But the respondent contends that the statute does not apply to the present case, but only to cases where the truster grants a deed *in facie* absolute, which has been delivered and followed by possession. This, however, is a doctrine utterly subversive of the provision of the statute, which declares in broad terms that no action of declarator of trust shall be sustained as to any deed of trust made for hereafter. To render the act applicable to the case, all that is required is, that there shall have been a trust deed, which the lease in question must be held to have been, or a deed against which a trust is alleged, and such has been the interpretation put on the act by all the writers, and by the decisions of the Court, as illustrated in the case of Duggan. 2. Further, the evidence actually adduced, were it legally admissible, is adverse to the respondent's claim. But, 3. In point of law the evidence relied on here is not such as can prove a trust and ought to have been totally disregarded.

Vide ante vol.
 iii. p. 6. O.

Pleaded for the Respondent.—1. Although by the act 1696, c. 25, it is provided that an allegation of trust cannot be proved by parole evidence, yet it is a fixed and established point, as proved by various authorities, that a trust may be proved by facts and circumstances, and particularly by the terms of a correspondence between the alleged truster and trustee. 2. The facts and circumstances appearing in this case, and the correspondence between the late William Gordon and sister, the appellant, afford the most convincing and complete evidence that the appellant held the sublease of part of the farm of Arduthy for behoof of her brother, William Gordon.

1810.
SPENCE
v.
AUCHIE, &c.
M'Lean v.
Creditors of
Cheesly, Feb.
8, 1810.
Forbes' Dec.
Moses, Feb.
4, 1773, Fac.
Coll. et Mor.
12352.

After hearing counsel, it was
Ordered and adjudged that the appeal be dismissed, and
the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Wm. Erskine, Henry Brougham.*

For the Respondent, *Wm. Alexander.*

NOTE.—Unreported in the Court of Session.

[Mor. 14226].

JOHN SPENCE, Merchant in Greenock, Trustee on the Sequestrated Estate of WILLIAM MATHIE, Merchant in Greenock,	} <i>Appellant;</i>
MESSRS. AUCHIE, URE, and Co. Merchants in Glasgow.	
	} <i>Respondents.</i>

House of Lords, 16th March 1810.

SALE—STOPPING IN TRANSITU—CONSTRUCTIVE OR ACTUAL DELIVERY.—Thirty-two puncheons of rum, belonging to the respondents, were lodged and bonded in the King's warehouses, kept by Messrs. Sandeman. While in this situation, the respondents sold the rum by auction, Mathie becoming the purchaser, giving bill for the price at four months, and receiving a delivery order from the sellers, which was duly intimated to the warehousemen, and the sale marked by them in their books, with the name of Mathie as the purchaser. Mathie thereafter sold eighteen puncheons, which were delivered, and the duties paid. But fourteen puncheons still remained in the King's cellar, when he became bankrupt, with the bill for the price still unpaid to the respondents. In an action brought by them to recover the fourteen puncheons, as still undelivered and in *transitu*, Held them entitled to stop in *transitu*.

1810.

SPENCE

v.

AUCHIE, &c.

Reversed in the House of Lords, and held, That the fourteen puncheons were to be considered as being completely in possession Mathie at the time of his bankruptcy, as in a question between vendors and vendees.

The respondents, Messrs. Auchie, Ure, and Co. import a considerable quantity of rum into the port of Greenock. It was deposited, on its arrival, in the cellars or warehouses Messrs. Sandeman, general agents in Greenock, who grant bond, with cautioners, to the proper officers, for the King's duties. One key of the warehouse, according to the bonding statutory regulations being kept by them, and another by the revenue officers, for security of the duties, without payment of which the rum could not be removed.

In this situation of matters, Messrs. Auchie, Ure, & Co. exposed the rum to auction and sale on 15th December 1802; and William Mathie purchased at the sale three two puncheons of this rum, at the price of £792. 12s., gave a bill for the price, at four months date, and received a delivery order for the rum from Auchie, Ure, and Co., which being duly intimated to Messrs. Sandeman, they marked opposite to the entry in their books, of each puncheon, the name of William Mathie, as the purchaser thereof.

Soon thereafter, eighteen puncheons were taken out of the warehouse on payment of the duties, and sold by William Mathie. The other fourteen puncheons remained still in the cellars, when William Mathie became bankrupt, which was before the bill for the price to the respondents fell due.

In these circumstances, the respondents presented a petition to the Water Bailie, concluding, "That as the bill granted for the price was not paid, Messrs. Sandeman ought to be ordained to deliver the said rum to them, or their order, and that the said Water Bailie ought to grant a warrant for selling the same, and for applying the proceeds, after deducting the expenses, towards payment of the said bill." The appellant, as Mathie's trustee, opposed the application." But the Water Bailie pronounced

Aug. 26, 1803. this interlocutor:—"Having considered the petition, answers, &c., invoice therewith produced, and replies: Finds the complaint relevant: Finds that the pursuers are entitled by law to reclaim the fourteen puncheons of the rum sold by them to the defender, William Mathie, still remaining in the King's cellars, in respect the price thereof has not been paid, therefore prefers them to the said rum as still

"being their property ; authorizes them to receive the same
 "from Messrs. Sandeman and the revenue officers, in whose
 "joint custody it is now stated to be, upon payment of the
 "duties, and to sell the same by public roup," as craved.

1810.

SPENCE
 v.
 AUCHIE, &c.

A reclaiming petition against this judgment was refused
 by the Water Bailie. An advocacy was then brought to
 the Court of Session, which was also refused. A second
 bill was also refused. And, on reclaiming petition to the
 Court, the Lords adhered to the interlocutor of the Lord
 Ordinary.* On second reclaiming petition, the Lords again
 adhered.

Sept. 26, 1803.

Dec. 15, —

Nov. 23, 1804.

Dec. 18, —

Against these interlocutors the present appeal was brought
 to the House of Lords.

Pleaded by the Appellant.—1. The possession of these
 thirty-two puncheons of rum was effectually given to Mathie,
 three months previous to his bankruptcy. The *jus proprie-*
tatis was therefore complete in him long antecedent to the
 period when the fourteen puncheons, that continued unsold
 in Messrs. Sandeman's custody, were reclaimed by the re-
 spondents. This appears from all the facts of the case,
 none of which are, or can be disputed. Messrs. Auchie,
 Ure, and Co., gave an order to Messrs. Sandeman, the cus-
 todiers, to deliver up the rum, *marked with specific marks*,
 to Mathie, the buyer. Messrs. Sandeman, immediately
 upon that intimation, altered the entries in their books,
 which was their usual manner of notifying a change of the

* Opinions of the Judges.

LORD PRESIDENT CAMPBELL.—"This is a question about stop-
 ping *in transitu*. In my opinion, the interlocutor reclaimed against
 is right. The result of the authorities quoted is in favour of that
 interlocutor. Sandeman and Co. were still acting as interposed per-
 sons, and as general agents for all concerned. Mathie had no com-
 plete hold of the goods, but only a mere constructive possession.
 The case of an indorsed bill of lading is different from a transfer of
 this kind by an order of future delivery.

LORD MEADOWBANK.—"There was not merely a constructive
 but an actual delivery. The King had merely a pledge, but the
 property was in Mathie. At this rate, goods in the King's cellar
 become not saleable, except for ready money. These goods have
 been a kind of credit to Mathie."

LORD HERMAND.—"I think the interlocutor right, on the ground
 that there was here an ambiguous custody."

Lord President Campbell's Session Papers, vol. 115.

1810.

SPENCE
v.
AUCHIE, &c.

property and possession of goods when under their keeping. By this means, they acknowledge that they held goods from that instant for and on account of the vendee and, accordingly, as his agents and custodiers, they gave up him the key of the cellar when required, delivered eight puncheons of the rum to his order, and permitted him to give the remainder. These acts *not only* constitute an acknowledgment that their possession of the goods was constructively that of Mathie, being retained for him and on account; but they amount to an actual admission of Mathie himself into direct and personal possession, by permitting him to deal with the property as his own, disposing of and exercising a direct *dominion* and control over the remainder. The circumstances of this case, therefore, are much more direct and unequivocal proof of an admission into possession than many which have been considered decisive of that fact. Thus, if goods had been deposited in a distinct cellar belonging to the vendors, a delivery of the key of that cellar to the vendee would have transferred the possession.

Harper v.
Faulds, Bell's
Cases, 474,
per Lord Ken-
yon; Ellis v.
Hunt, 3
Durnf. and
East, p. 464.
Ellis v. Hunt,
ut supra.
Leeds and
Others v.
Wright, v. iii.
Bos. and Pull,
320.

So, marking a case in which goods were packed, while in the custody of a warehouseman, was held to be a taking into possession, and to constitute the custodian of the goods the warehouseman of the vendee. Also, packing and repacking by a general agent of the vendees, without his knowledge, have been adjudged conclusive of the question of actual delivery, and an alteration of possession. If, therefore, possession of the rums was delivered to the purchaser, prior to his bankruptcy, the right of the sellers to reclaim them was, *ipso facto*, gone, whether the law of stoppage of goods *in transitu* was previously applicable to the case or not. 2. Besides, the right which a vendor has to stop goods, in the case of the vendee's insolvency, whilst in their passage in transit to him, has no place here. There was no transit or journey of the goods from the place of sale to that of final delivery, during which they could be stopped or arrested. There was no middleman or carrier intrusted with them for the purpose of conveyance from out of whose custody they could be taken. These things are essential, in the law of England, to raise the question of arrestment *in transitu*. There can be no right to stop goods in their passage from one place to another, where the transit is already complete, and where the goods have no passage to perform from one place to another. In the present case, there was no other place of final delivery in the view of the buyer as

sellers, than the spot in which the goods lay. It was a sale of the rum in the warehouse of Messrs. Sandeman, to be delivered there. The transfer, in the books of the warehouseman, from the names of Auchie, Ure, and Co. to that of William Mathie, was complete delivery. The question, therefore, as to what shall be considered such a constructive delivery to a carrier as to render the vendee liable for the price of the carriage, and subject to the loss of the goods, without divesting the vendor's right to arrest them in their passage to the place of delivery, does not arise. The true point is, Whether the buyer or sellers are to be considered in possession of the goods by the intervention of Messrs. Sandeman, as agents, and to which of them the possession in *their cellars* is to be referred? This point cannot admit of dispute. After intimation of the order to deliver the rums to *Mathie*, they lay in the cellars at his risk, and subject to his disposal. From that moment he became liable for the duties, and also for payment of the warehouse rent, while the respondents were entirely discharged of all liability on these accounts. When the order was intimated, and the puncheons marked in Sandemans' books, as sold to Mathie, all privity of contract ceased between Messrs. Auchie, Ure, and Co. and Messrs. Sandeman. After this, Sandemans held the rums for Mathie, in whose possession they now were, through these gentlemen, as custodiers. After this possession, there could be no right to reclaim. But even supposing the Sandemans were held in law to be the custodiers for Auchie, Ure, and Co. of the rum, up to the time when the eighteen puncheons, out of the thirty-two, were delivered to Mathie, still there appears no intention, either previous to, or at the time of delivery, to give possession of part and withhold the rest; the delivery of the eighteen puncheons must be taken to be *quatenus* delivery of the whole, so as to vest the entire property in Mathie, exempt from any right of the seller to reclaim.

1810.

SPENCE

v.

AUCHIE, & Co.

Slubey and
Others v. Hey-
ward and
Others, 2
Hen. Black.
504.

Pleaded for the Respondents.—The present being a question between the vendors, who have received no value for the rum, and the creditors of the vendee, who wish to apply it to their own payment, the point is, What, as between the vendors and vendee, is sufficient to complete the transference of the goods and prevent stoppage, where the price has not been paid? In all continental states, the vendor is entitled to demand his goods back, or to claim a privilege, in competition with other creditors, where the vendee fails without paying the price, and where the goods are still dis-

1810. distinguishable from the other property of the bankrupt. different rule has been established in England, and is not adopted in Scotland, viz. That wherever the goods have come into the actual possession and custody of the vendee the property is to be held as finally transferred beyond the reach of restitution, although the price should be still unpaid. It was not without difficulty that this rule was established; it was not without regret that, in some late cases, has been acceded to as a settled point. Lord Hardwick in delivering his opinion on this subject, more than half a century ago, said, "Although goods were delivered to a principal, I could never see any substantial reason why the original proprietor, who never received a farthing, should be obliged to quit all claim to them, and come as a creditor, only for a shilling perhaps in the pound unless the law goes upon the general credit the bankrupt has gained by having them in his custody." In a later case all the judges in the Court of King's Bench, in comparing the English law with that of Russia, (which, like that of other continental states, allows restitution on bankruptcy wherever the goods can be identified), expressed regret that a law so equitable was not adopted in England. And, again, in a still later case, Lord Kenyon said, "If, in those cases, where goods continue in bulk, and discernible from the general mass of the trader's property at the time of bankruptcy they could be returned to the original owners, who have received no compensation for them, without injury to the claims of others, it would be much to be wished." Although, therefore, the rule be too firmly fixed to allow goods to be reclaimed after actual delivery, this is a rule which is not to be farther extended. There are cases in which actual delivery at the moment of sale is impossible as, for example, goods sold or ships sold at sea, goods in foreign country, or commodities in the hands of a manufacturer unfinished. In such cases, the rule of law that requires actual delivery has been relaxed, on considerations of equity, that *where the price is paid*, the best delivery the circumstances admit of is received as constructively sufficient to pass the property. But, in no other circumstance whatever, is any thing less than actual and real delivery held to complete the transference, and divest the vendor of his right to resume the goods on failure of the vendee. This is now completely settled as the law in both parts of the island; and the cases by which, in England, it has been established are thus summed up by Judge Buller, in speaking
- SPENCE**
v.
AUCHINCLOSS, &c.
- Snee v. Prescott,** 1 Atk. 249.
- Inglis v. Usherwood,** 1 East, 515.
- Neale v. Ball,** 2 East, p. 117.

of the doctrines of stopping *in transitu* :—"In former cases, the line has been precisely drawn, and they all turn on the question, Whether or not there has been an *actual delivery* to the bankrupt? It is of the utmost importance to adhere to that line, for if we break through it, we shall endanger the authority of the cases which have been already decided, and shall fritter away the rule entirely." Was there here, then, an actual, or only a constructive delivery? If the former, it signifies nothing whether the price was paid or not? If the latter, the admission that the price was not paid, offers to us the privilege of stopping *in transitu*, and leads directly to a confirmation of the judgment of the Court below. Now, it seems to be indisputable, that under the definition of actual delivery, none can be included, in which there is not, on the part of the vendee, either an absolute and corporal apprehension, or, at least, a direct and exclusive possession, custody and control, without the intervention of any third party or middleman. Applying this rule to the goods in question, they cannot be said to have been actually delivered. They were not given up to the exclusive control and possession of the vendee, without the intervention of any middleman. And no act of delivery took place but the intimation of an order to this middleman, and his acceptance of that order, as one he should be bound to obey when due requisition should be made, and when those duties should be paid, for which the goods were kept in bondage under his key and that of the revenue officer.

1810.

SPENCE

v.
AUCHIE, &c.
Ellis v. Hunt,
4 Term. Rep.
464.

Stokes v. La
Riviere, 3
Term. Rep.
p. 466.

Hunter v.
Beal, Ibid.
p. 467.

After hearing counsel,

The Lords find, that the pursuers, in the application to the Water Bailie, are not entitled in law, in respect that the price thereof was not paid, to retain the puncheons of rum in question, sold by them to William Mathie, which were remaining in the King's cellars. Find, That in the circumstances of this case, these goods ought, (in a question as between the vendor and vendee thereof, in whose possession the same were), to be considered as being in the possession of William Mathie the vendee, before he became bankrupt, inasmuch as Messrs. Sandieman ought, in such a question, between such parties, in the circumstances of this case, to be considered as holding them prior to the bankruptcy, as the agents and servants of the vendee only. And it is therefore ordered and adjudged, That all parts of the several interlocutors complained of, so

1810.
 MASTERTON,
 &c.
 v.
 MEIKLEJOHN,
 &c.

far as they are inconsistent with this finding, be, and the same are hereby reversed. And it is further ordered, that, with this finding, the cause be remitted to the Court of Session in Scotland to do therein, and as to the several interlocutors complained of, as this finding requires, and is consistent therewith.

For Appellant, *William Adam, M. Nolan.*

For Respondents, *Sir Sam. Romilly, Geo. Jos. Bell, Henry Brougham.*

NOTE.—Before this reversal was pronounced in the House of Lords, it had been decided in the Court of Session, in another case, (*Tod and Co. v. Rattray*, 1st Feb. 1809,) upon a strongly urged opinion delivered by Lord President Hope, that their judgment in *Spence v. Auchie, Ure, and Co.*, was erroneously decided. Lord President Blair and Lord Meadowbank concurring in this.

ALEXANDER MASTERTON, ROBERT BALD,
 WILLIAM FULTON, Bailies of the Burgh of
 Culross; JAMES BENNET, Merchant-Coun-
 cillor and Dean of Guild, elected at the
 Meeting at Michaelmas 1803; GEORGE
 ROLLAND, SIR ROBERT PRESTON, and
 Others, Councillors of the said Burgh,

Appellants;

DAVID MEIKLEJOHN, elected Second Mer-
 chant-Bailie at Michaelmas 1802, and
 Others, Councillors and Office-Bearers of
 the said Burgh of Culross,

Respondents.

House of Lords, 22d March 1810.

BURGH ELECTION OF MAGISTRATES AND COUNCILLORS.—Circumstances in which it was held, that as there was not a majority of councillors present to constitute a legal meeting of council, an objection stated to the legality of the meeting, on that ground, was sustained. Affirmed in the House of Lords.

This was a dispute about the election of the Magistrates and Councillors of the burgh, under the old system of election, wherein the respondents complained of that election, and prayed the Court to declare the election void, on the following grounds:—1. That due premonition was not given, and no premonition regularly served. 2. That there was not a quorum of council present. 3. That the election was the act of a minority of councillors, in opposition to the act of the majority. 4. That it was only the act of a certain

number of magistrates or councillors, taking upon them to separate from the majority, who had been such for the year preceding, and also taking upon them to make a distinct and separate election. 5. That, in terms of the statute, 16 Geo. II. c. 11, it was in certain essential respects the act of the minority of magistrates, councillors, and deacons, respectively, separating from the majority of those having right to act by the constitution of the burgh, and making a separate election of magistrates and councillors.

1810.

HILL
v.
RAMSAY.

After proof and much discussion, the Court pronounced this interlocutor, "Repel the objections stated in the com-plaint, with regard to the summoning the council for the meeting of 28th September 1803; but find that there was not a majority of councillors present to constitute a legal meeting of council upon the said 28th September; and, therefore, sustain the objection stated on that head, and, before answer as to the other points in the cause, appoint the counsel for the said parties to give in memorials to see and interchange the same betwixt and the second box day in the ensuing vacation."

Mar. 5, 1805.
May 28, 1805.

On reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *Thos. Plumer, David Boyle.*

For the Respondents, *Henry Erskine, John Clerk, Wm. Adam, Thos. Thomson.*

NOTE.—Unreported in the Court of Session.

ROBERT HILL, Esq. W.S.,	<i>Appellant;</i>
ANDREW RAMSAY of Whitehill, Heir-at-Law	}				<i>Respondent.</i>
of GEORGE RAMSAY, late of Whitehill,					

House of Lords, 30th March 1810.

SERVITUDE OF ROAD—PREScriptive USE AND POSSESSION—DERELICTION.—A servitude of road was claimed, where there was no writing or title to constitute the servitude, and solely on the ground of immemorial use and possession. Held, on the evidence produced, that though the possession and use were proved for a period of forty years, yet, as it was also proved, that, for a period

1810.

HILL

v.

RAMSAY.

of twenty or thirty years, that possession had been interrupted ploughing the lands over which the servitude of road was claimed the same was to be held as having been abandoned and dereliquished; and the possession therefore being not continuous but interrupted, the same was not effectual to constitute the servitude claimed.

The appellant, Mr. Hill, purchased a farm, called Firth from Mr. Cadell of Banton, being part of the lands Auchindinny, conterminous with the lands of Kirkettle then belonging to the respondent's brother, the deceased George Ramsay of Whitehill.

Soon after this purchase, Mr. Hill raised an action before the Court of Session in Scotland, claiming the servitude of a road through the inclosures of the lands of Kirkettle, belonging to the respondent, or through Kirkettle Haugh, upon the banks of the river Esk, setting forth "that his predecessors in the lands of Firth, had, by themselves, or the tenants therein, or servants, or others employed on the lands, been in the uninterrupted possession of a road from the ford in the water of Esk, at the foot of Kirkettle cleugh, passing through the lands belonging to Major Ramsay," for more than forty years.

Major Ramsay alleged, that the field called Carty Haugh and the other fields interjacent, had been ploughed for a period beyond the memory of man, without any space for a road through them; and that, more than thirty years ago Mr. Ramsay had planned and executed enclosures of the whole farm of Kirkettle, without the least idea of any such road, and without any objection being made, either by the proprietor or the tenant of the farm of Firth.

The Court ordered an eye-sketch of the present aspect of the ground to be made out, over which it was said the servitude road ran.

A proof was also led on both sides in support of their respective allegations. This having been reported, it appeared from the proof that the use and possession, at least for forty years, was made out by the witnesses; but, on the other hand, there was proof of interruption in the ploughing of the land over which the servitude was claimed, for many years, and the usage itself had ceased for a period of twenty or thirty years anterior to the present action.

The appellant contended that the eye-sketch proved that the track of road in question remained distinct, excepting in some places, where, from recent agricultural operations it had been obliterated. That the evidence proved



distinct and uninterrupted use in the occupiers of the farm of Firth of the road in question, in every way in which that use was susceptible, from the year 1737 to 1795, though, subsequent to the year 1784, the use was less frequent than previous to that period. That the evidence founded on by the respondent confirmed that of the appellant as to the use, and where it did not, it was merely negative, and no way inconsistent with the testimony given by the appellant's witnesses. That the appellant's predecessors were infeft in this farm, with parts and pertinents; and the use of the road for forty years, being once made out in point of fact, the servitude was established, which could not be lost, except by a disuse of forty years.

The respondent contended, it was doubtful how far, when a country is lying open and uninclosed, the occasional passage of a few people, through any particular part of it, is sufficient to create or constitute the legal servitude of a road, where such passage is neither the ordinary nor necessary communication with the place. 2. Whether, when such occasional passage goes through arable ground, the labouring and cropping of that ground without challenge, and without leaving any space for a road, is not real evidence that such road is not at all a matter of right, or at least, that this ploughing is complete interruption, *via facti*, to bar the acquiring any servitude. 3. When a road can only be used in a particular way, and for a particular purpose, and when, from the change of circumstances, that purpose no longer takes place, whether the party who is allowed that use, is entitled from mere whim, or any other motive, to reclaim that use. 4. Whether a right to any road, which is founded on no other title but mere possession, and no wise supported by any contract or other written title, may be revived, after being in complete disuse for a period of twenty or thirty years, as it was undoubtedly proved to have been in this case. It was clear that the object of the appellant's proof was to establish, by parole evidence, such a degree of use by his predecessors, at some former period of the road in question, as was sufficient to create a legal right in him again to revive the use. But the respondent contended that this claim, in such circumstances, was untenable.

The Lord Ordinary found the use and possession of the June 23, 1803. road proved, and that "the right of using the same has not been altogether abandoned or lost by dereliction of forty years." On representation, his Lordship adhered. But, on reclaiming petition to the Court, the Lords altered and May 25, 1804.

1810.

HILL
v.
RAMSAY.

1810.

sustained the respondent's defences, and assoilzied. further petition, the Court adhered.

HILL

v.

RAMSAY.

Jan. 22, 1805.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—According to the law Scotland, possession for forty years gives a right to a road, and, according to the evidence adduced in this case, there has been possession for a longer period than forty years of the road in question. The possession was not occasional, but constant and continuous, and this right cannot be lost except by a disuse of forty years.

Pleaded for the Respondent.—It is clearly established by the proof, that there never was at any one period such a road in the line in question, as to create a servitude upon the respondent's lands; so that if the question were to be judged of as matters stood thirty years ago, there would not be the smallest ground for supporting the claim of the appellant. Where the constitution of a road depends upon use merely, and not upon writing, the use proved must be continuous, general, uniform, and uninterrupted; but where it is only, as in this case, an ambiguous and limited use, if interrupted, it cannot avail. If the constitution of the right was founded on writing, then it would be immaterial what kind of use had followed; but here, where no writing existed and where the whole claim is rested on right acquired by use, that possession must be of the most unequivocal nature, and be continuous and uninterrupted for forty years. It is proved by the witnesses on both sides, that the ground over which this road is said to have run, was ploughed and otherwise laboured without the smallest regard to such road. It is more than thirty years since Mr. Ramsay began to close these lands; and he never heard of such road, nor did any objection stated to these operations during all that time. A right founded on possession alone must, from its very nature, depend upon the continuance of that possession, and no more discontinuance is necessary to put an end to the right than what is necessary to show that the disuse is deliberate and intentional. *Eodem modo amittitur et sessio quo acquiritur.*

After hearing counsel, it was

Ordered that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Wm. Adam, Henry Brougham.*

For Respondent, *Wm. Alexander, Fra. Horner.*

NOTE.—Unreported in the Court of Session.

1810.

<p>SAMUEL JAMES DOUGLAS, an Infant, and JOHN DOUGLAS, W. S., Tutor at Law to said Infant, JOHN SMITH WILSON of Netherhouse,</p>	}	<p><i>Appellants ;</i> <i>Respondent.</i></p>	<p>DOUGLAS, &c. v. WILSON.</p>
--	---	--	--

House of Lords, 8th May 1810.

DISPOSITION—ABSOLUTE, OR IN SECURITY—ABSOLUTE, OR IN TRUST
—ACT 1696, c. 25.—A disposition of lands *ex facie* absolute and irredeemable, was granted to a party without any back bond. The granter of the conveyance, for many years thereafter, continued to act in all respects as proprietor with reference to the lands, in lifting rents, granting receipts for these rents, and granting leases of the lands ; and he contended by these proofs,—of writings, of acknowledgments and admissions of the grantee, sufficient evidence was adduced to show that the grantee was a mere trustee or incumbrancer. Held that the disposition was absolute and irredeemable, and that he could not redeem or reclaim the lands.

The lands of Broom originally belonged to the infant appellant's ancestors, but had been sold to the respondent in 1764, under a conveyance *ex facie* absolute and irredeemable.

There had previously existed between the parties a series of money transactions, in which the appellant's ancestor became ultimately the debtor. And the present action of reduction, declarator, and count and reckoning was brought by him, to have it found that the said disposition and conveyance granted to the respondent was merely in security, and that he had a right to redeem on payment of the sum due thereon.

There was no back bond to found on ; but the appellant maintained that the following were sufficient circumstances of evidence to show that the disposition was not absolute in its nature, but redeemable on payment of the debt:—1st. That Mr. Wilson of Maidenhill, the appellant's ancestor, after the date of this disposition, kept possession, and always drew the rents, which was proved by accounts and receipts, as well as by bills granted to him therefor. 2d. That the services of kain-fowls stipulated in the leases of Brown, were all performed and delivered to Mr. Wilson of Maidenhill. 3d. That he paid for the repairs on the houses and dikes of the farms. 4th. That he paid for six years the schoolmaster's salary exigible against the property, as per

1810. receipts. 5th. That he granted a lease, of this date, for twenty-two years, of a part of the lands of Broom, so alleged to be conveyed and sold absolutely. 6th. That a ren-
 DOUGLAS, &c. dence was thereafter entered into between Mr. Wilson
 WILSON. Maidenhill and Mr. Barclay relative to the value of a small
 Mar. 12, 1767. piece of ground of Broom. This matter was settled granting a perpetual lease in 1769 to Mr. Barclay of the piece of ground, which describes "John Wilson of Maidenhill, in the parish of Mearns, *heritable proprietor of lands after let.*" To this lease the respondent signed as a consenter thus, "with the consent of John Smith, a son of Wilson of Netherhouse." On 7th June 1770, the term having fallen into arrear, Mr. Wilson of Maidenhill registered the tack, and charged him, in the character of proprietor, which was arranged by an assignation to him of the stock, crop, &c. on the farm, in security. In the following year, 1771, a new assignation was granted to "John Wilson of Maidenhill, my landlord." And in a discharge and renunciation of the lease granted by the said John Wilson, which sets forth, "considering that John Barclay, my tenant, has delivered up his tack of my lands," &c. to which discharge the respondent was one of the testamentary witnesses. He also acted as Commissioner of Supply on account of this property. There was also a receipt produced, signed by the respondent, to show that, for long after the date of this conveyance, and in 1775, accounts were not closed between them, and that he had paid the respondent at that date £100 "to account."

There was, further, an admission made by the respondent, in a former process, to this effect:—"The £200 was paid, and the bill for the balance accepted by the petitioner having hitherto deferred taking possession of the lands, in order to afford Maidenhill every possible opportunity of redeeming them, by making payment of what he owed to the petitioner." There was also produced the draft of a bond which, though intended to be executed to show that this disposition was redeemable, yet was never executed.

The appellant contended that these proofs by writings, acknowledgments, and admissions and circumstances otherwise, amounted in law to the written evidence required by the statute 1696, c. 25, to establish a trust, and to show that the respondent was a mere incumbrancer. In defence, it was stated, that there was an absolute and irredeemable

the lands of Broom to the respondent, and that the tated in the disposition as paid, consisted in part of ritable securities which he had previously over the ty.

1810.

DOUGLAS, &c.

v.
WILSON.

n these facts, Lord Glenlee, Ordinary, held that the dent was bound to hold count and reckoning with the unt, and, on payment of any balance, that he must over the property to him. But, on reclaiming petition Court, this judgment was pronounced :—"The Lords May 14, 1802. ing advised this petition, with the answers, replies, duplies, alter the interlocutor reclaimed from, find sale of the lands of Broom absolute and irredeemable, assoilzie the defender, and decern." On reclaiming n against this interlocutor the Court adhered. Feb. 28, 1804. ainst these interlocutors the present appeal was it to the House of Lords.

ded for the Appellant.—Abstracting the question any special rule of the statute or common law, and it merely as a question of evidence, there can be no that the relation of the parties was merely that of and creditor, not that of seller and purchaser; and ie disposition and conveyance in question was a mere y, and not an absolute and irredeemable right. Be- 1st. The respondent has judicially admitted, so late '3, that the conveyance was redeemable. 2d. That sion was all along retained by the alleged seller, by the rents, granting leases of the farm, and doing other ich as alone belong to a proprietor. The respondent ds to explain away these proofs, by alleging, that gh at first the conveyance was only intended to be in ty, yet that, in 1773, it became finally absolute. That his there was an entire change in the nature of the

That he then took sasine on his absolute conveyance, o had possession; but there is no evidence of such e of the nature of the right. The accounts then) rendered did not prove such change; and the sasine only proved an intention to complete his *heritable se*. Neither the rules, therefore, of the common law, ie Scotch statute with regard to trusts 1696, c. 29, can any bar to the evidence by which the real nature of resent conveyance, as being one in itself reducible, is it to be established. In former times, the most solemn and conveyances were frequently cut down by mere e proof. And although by the statute 1696 it is de-

1810. **DOUGLAS, &c.**
 v.
WILSON.

clared that no declarator of trust shall be sustained except "a declaration or back bond of trust, lawfully scribed by the person alleged to be trustee," be produced, yet the law had never been interpreted so rigidly not to admit of proof of the nature now adduced as suffice which comprehends the judicial admission of the party.

Pleaded for the Respondent.—The appellant is barred law from challenging the respondent's title, because he produced an *ex facie* absolute and unexceptionable conveyance, for a valuable consideration, from the appellant's predecessor, followed by an uninterrupted possession for thirty years. He is therefore entitled to found upon those general principles of law on which the security of purchasers and landholders in general depend, and to plead that he is not bound to enter into any detail whatever, or to explain how he acquired right to the lands of Broom. According to the law of Scotland, an absolute and unqualified conveyance of land cannot, in opposition to written evidence, be construed into a conveyance in trust or security only, on mere extraneous presumptions. The general rule founded upon the principles is, that effect must be given to the written title declaring clearly and explicitly the intention of the parties without regard to the inferences or conjectures which may be drawn from extraneous circumstances when set in opposition to written documents and titles. The present case falls clearly under the act 1696, which excludes all challenge of title upon the allegation of trust, unless the trust is instructed by a written declaration or backbond, or offer of proof by the oath of party.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellants, *Sir Samuel Romilly, Fra. Horner.*

For Respondent, *Ad. Colquhoun, Wm. Adam, Thomas Blair*

NOTE.—Unreported in the Court of Session.

[Mor. App. Service of Heirs, No. 2.]

1810.

ANDREW BLANE, W.S., Trustee for Sir	} <i>Appellant</i> ;	BLANE
ANDREW CATHCART,		v.
ARCHIBALD, EARL OF CASSILLIS, and Others,	<i>Respondents.</i>	THE EARL OF CASSILLIS, &c.

House of Lords, 9th May 1810.

GENERAL SERVICE.—The question was, whether a general service could establish in Earl David the character of heir of provision to his brother, so as to connect him with the deed 1748? The Court of Session, under a remit from the House of Lords to reconsider the question, altered their former judgment as to the effect of this service of 1776, and found that it was not a service as heir of provision to connect Earl David with the deed 1748, or any similar deed; and, therefore, that the lands specially mentioned in the interlocutor were not carried by that service. But, 2. In regard to the other lands specially mentioned in the interlocutor, the Court found that no remit having been made as to them, they adhered to their former interlocutor. The first point being in favour of the appellant, no appeal was brought as to it, but he brought an appeal on the second point, contending that these lands fell under the remit. Held that it was not the intention of the House, by their remit to the Court of Session, to authorize the Court to review their interlocutors in regard to those lands, and, therefore, appeal dismissed.

The particulars of this case are reported at page 1 of this volume.

The House of Lords affirmed the judgment of the Court of Session, in so far as related to the lands in the charter of 1774, but *quoad ultra* remitted back to the Court of Session "to review all the interlocutors, as far as they respect the effect of the service of Earl David in 1776, with regard to the lands of Enoch and Little Enoch, the lands of Portmark and Polmeadow, the tenements in Maybole, and teinds conveyed by Crawford of Ardmillan, or any other lands or subjects, the title to which is in dispute in this cause, if any such there be, not ruled by the aforesaid affirmance, and to hear the parties again as to the effect of the said service, as to the said lands and teinds, and as to the right to the said lands and subjects, and to do thereupon as to the Court shall seem meet."

In terms of this remit, the Court of Session resumed consideration of the question, and ordered parties to give in

1810. mutual memorials upon the points in the cause remitted for reconsideration. These memorials having been given in and debate had thereon, the Court pronounced this interlocutor :—“ The Lords having advised the mutual memorials for the parties, they find that Earl David’s general service in 1776 was not a service as heir of provision to connect him with the settlement in 1748, or with any similar deed of provision or settlement, and, consequently, was not sufficient to carry the subjects which were specially provided by any such deed, and were not contained in the charter of 1774, or in any other title deed or charter of a similar nature : Find that this description applies to the lands of Enoch and Little Enoch, the lands of Portmark and Portmeadow, the tenements in Maybole, and the teinds conveyed by Crauford of Ardmillan, and that they were not carried by the general service ; therefore sustain the reasons of reduction as to these subjects, and so far alter their interlocutor of 16th November 1802 ; repel the defences, and reduce, decern and declare, in terms of the summons ; but with regard to the lands of M’Gowanston Mill of Drumgirloch, Dunnymuck, Whitestone, Pennyglenn, Barony of Greenan and lands of Balvaird ; find that the order of the House of Lords contains no special remit as to these lands, nor has the pursuer sufficiently made out that they fall under the general remit, or at any rate, that the interlocutors formerly pronounced as to these lands ought to be altered ; and therefore adhere to the said interlocutors, and decern.”

This interlocutor thus held that the appellant’s challenge was good as to the lands called the Pendicles. But he was not content with this success, and therefore insisted further as to the other lands.

Both parties reclaimed. The respondents prayed to alter this interlocutor, and to assoilzie from the conclusions of the action, in terms of the former judgments pronounced by the Court. The appellant, on the other hand, contended in his petition, that the interlocutor was much too favourable for the respondents ; and he endeavoured to establish the three following propositions, 1. That the order of the House of Lords contained a remit as to the whole lands and subject in dispute, excepting those contained in the charter of 1774 and similar titles ; consequently, that the remit embraced the lands of M’Gowanstone, Mill of Drumgirloch, Dunnymuck, Whitestone, Pennyglenn, Barony of Greenan, and lands of Balvaird.

2. That the last recited interlocutor of the Court below, and the interlocutors formerly pronounced in the cause, with respect to the several lands just enumerated, ought to be altered, and the reasons of reduction sustained as to these lands, in regard that the same are not contained in the charter 1774, or similar titles, and that David, Earl of Cassillis, made up no regular titles thereto.

1810.

BLANE
v.THE EARL OF
CASSILLIS, &c.

3. That in case their Lordships still remained of opinion that the titles made up by Earl David appeared sufficient to vest the said lands and subjects in his person, the appellant was entitled to show further, by writings in the hands of the respondents, or under their power, that Earl David lay under limitations and prohibitions, which disabled him from alienating those subjects, to the prejudice of the heirs called by the disposition 1748, and that therefore the Court should grant letters of incident diligence against havers, for recovering all deeds of settlement and other writings calculated to instruct this fact. After answers were given in, the Court finally pronounced interlocutors adhering, and refusing the prayer of both petitions. Nov. 24, 1807.

Against the interlocutor of 10th Feb. 1807, in so far as it was complained of by his reclaiming petition, and from the said interlocutor of 24th Nov. 1807 adhering thereto, the appellant brought his appeal on the 27th Jan. 1808.

Pleaded for the Appellant.—1. The judgment of the House of Lords consists of two distinct parts:—1st, That which affirms the interlocutors appealed from, to a certain specified extent; 2d, That which remits back the cause to the Court of Session for further consideration. It is clear that the judgment must be held to have embraced the whole cause which was carried to appeal; for to say that it did not, is in other words to maintain, that besides the part affirmed, and the part remitted, there was a part still left depending in the House of Lords. If it embraced the whole cause, it necessarily followed that the interlocutors of the Court below, in as far as they were not affirmed, fell under the remit. And the question, therefore, came to be, To what extent did the affirmance go?

In regard to this, the words and meaning of the judgment were thought to be clear. It is ordered and adjudged "That all the interlocutors appealed from in the said appeal, so far as the same relate to the lands and subjects contained in the charter of 1774, or in any similar titles, be, and the same are hereby affirmed." The affirmance

1810.
 ———
 BLANE
 v
 THE EARL OF
 CASSILLIS, &c

then extends to "the lands and subjects contained in the charter of 1774, or any similar titles; but it extends further. It thus became matter for inquiry, what lands and subjects which are not contained in the charter 1774, or similar titles, the respondents cannot plead an affirmance.

2. With regard to the expression "similar titles," a meaning does not seem to admit of any doubt. It means titles having the same destination as the charter 1774, heirs and assignees, and remaining personal at the death of Earl Thomas, so as to admit of being carried by a general service in favour of Earl David, as nearest and lawful heir of line of his brother. It was because the charter 1774 was conceived in favour of heirs and assignees, and remained personal at the death of Earl Thomas, that it was held to be carried by the general service which Earl David expected in 1776, as is plain from the expression employed in the interlocutor of date 16th Jan. 1800; the same service would of course, carry any other personal rights which stood devised to the heirs and assignees of Earl Thomas, but could carry no rights or titles of any other description. And the argument in the House of Lords was confined to two great questions, Whether the general service in 1776 was sufficient to vest Earl David with the character of heir provision to his brother, so as to connect him with the deed 1748; and, Whether the charter 1774 operated any alteration of that deed? no attention was paid to subordinate questions, so as to distinguish whether, in fact, there were or were not, other lands and subjects, which might be carried by the general service 1776, by reason of their being contained in title-deeds similar to the charter 1774. If there were any such, there could be no doubt that the interlocutors appealed from, as to the lands contained in those titles, fell to be affirmed, upon the same principles that had been applied to the charter 1774. So far with respect to the *affirmed* part of the judgment, the most important in this question. But, in regard to the other part, which regards that remitted, it proceeds thus: "It is further ordered, that the cause be remitted back to the Court of Session, to review all the interlocutors, as far as they respect the effect of the service of Earl David in 1776, with regard to the lands of Enoch and Little Enoch, the lands of Portmark and Polmeadow, the tenements in Maybole, the teinds conveyed by Crauford of Ardmillar, or any other lands or subjects, the title to which is in dispute

"in this cause, if any such there be, not ruled by the afore-
said affirmance; and to hear the parties again, as to the
effect of the said service as to the said lands and teinds,
and as to the right to the said lands and subjects, and to
do thereupon as to the Court shall seem meet."

1810.

BLANE

v.

THE EARL OF
CASSILLIS, &c.

If, then, there are any lands or subjects not ruled by the affirmance, that is to say, any lands or subjects besides those contained in the charter 1774, and similar titles, it was submitted to be quite clear that they all fell under the remit, and that Sir Andrew Cathcart's claim to such lands and subjects remained entire. Such are the lands of M'Gowanstone, Mill of Drumgirloch, Dunnymuck, White-stone, Pennyglen, Barony of Greenan, lands of Balvaird, as not contained in the charter 1774, or in any similar titles; and David, Earl of Cassillis, made up no regular titles to these lands, sufficient to vest them in his person. And the appellant has a right by law to show further, by writings in the hands of the respondents, that Earl David lay under limitations and prohibitions, which disabled him from alienating those subjects.

Pleaded by the Respondents.—The remit could not include, and was not meant to include, more than the lands and subjects therein specially mentioned, because neither the words of the remit, nor the intention of your Lordships, authorized the Court of Session to review their former judgments, except with regard to the effect of the service 1776 as to the lands of Enoch and Little Enoch, and lands of Portmark and Polmeadow, the tenements in Maybole, the teinds conveyed by Crauford of Ardmillan, or as to any other lands or subjects, and to hear the parties again, as to the effect of the said service, as to the said lands, and as to the right to the said lands and subjects. The Court, therefore, most properly found that there was no special remit as to the lands in question, since they were neither specified in the remit, nor had the service 1776 any effect whatever upon the question, which the appellant again endeavoured to stir, as to these lands. But, even supposing it had been competent for the Court of Session to reconsider those questions, the Court most properly found there was no ground whatever for altering their former judgment, because, as to the question of consolidation, independent of the merits of that question being clearly with the respondents, it could not in any view have affected the right of Earl David to convey these lands, since, at all events, he had a

1810.
 BLANE
 v.
 THE EARL OF
 CASSILLIS, &c.

right to these lands, in virtue of a crown charter and infeftment, upon which forty years' possession had followed: and also, supposing that the property and superiority had remained separate, yet he had a right to each; and as he conveyed every right that was in him to the respondent, so he has a complete right and title to all the lands belonging to Earl David, property and superiority. With regard to the lands of Greenan and others, Earl David's title was completed by precept of *clare constat*, which is equivalent to a special service, bearing an express reference to the former investiture, and granted to him in the very terms in which he was called by the former investiture, and as the *heir in those lands*. And with regard to the superiorities of these lands, they are completely decided by the affirmance of your Lordships, declaring "that all the interlocutors complained of in the said appeal, so far as the same relate to the lands and subjects contained in the charter of 1774, or any similar titles, be, and the same are hereby affirmed." Now part of these superiorities is not only contained in the charter 1774, which was granted to Earl Thomas, and his heirs and assignees, but all the other superiorities stood upon similar titles to Earl Thomas, and his heirs and assignees, and it has been correctly adjudged that Earl David took up all such rights by his service 1776. And, finally, that the demand for the production of further writings is most incompetent and absurd, after a litigation of sixteen years, and after the fullest production which has perhaps been made in any cause.

After hearing counsel, it was

Ordered and adjudged that it was not the intention of this House, in its order of 24th May 1805, either specially or generally, to remit to the Court of Session to review their interlocutor with regard to the lands of M'Gowanstone, Mill of Drumgirloch, Dunnymuch, Whitestone, Pennyglen, Barony of Greenan, and lands of Balvaird, and that the Court of Session were not authorized to review the interlocutors with relation thereto, by the said order of this House; and that such parts, therefore, of the said interlocutors of the Court of Session of 10th Feb. and 24th Nov. 1807, as have relation thereto, being unauthorized by the remit of this House, are null and void, (being the parts of the interlocutors which are unfavourable to the appellant Blane, and as such complained of in his appeal.)

and, with this finding and declaration, it is ordered and adjudged that the appeal be dismissed. 1810.

For Appellant, *Sir Samuel Romilly, Mathew Ross, John Clerk, Thos. W. Baird.* STILL, &c.
v.
THE
MAGISTRATES
OF ABERDEEN,
&c.
For Respondents, *David Boyle, Wm. Adam, Henry Erskine, Ad. Gillies.*

[Mor. App. "Jurisdiction, No. 10."]

ALEXANDER STILL, JAMES WATT, JAMES KEITH, ALEXANDER DAVIDSON, and GEO. WILLIAMSON, Fleshers in Aberdeen, for themselves and the whole other Fleshers of Aberdeen, } *Appellants;*
THE MAGISTRATES AND TOWN COUNCIL of Aberdeen, and ROBERT BRUCE and ALEXANDER BREMNER, their Tacksmen of the Weigh-House Customs, } *Respondents.*

House of Lords, 16th June 1810.

TOWN DUES—JURISDICTION—CHARTERS—USAGE.—The Magistrates of Aberdeen were in the practice of exacting a duty in their City Weigh-House, on all tallow, butter and cheese brought into the market. The question here was, Whether this regulation, in reference to tallow, included refined tallow as well as tallow in the rough, and was to be exacted from freemen? Held, in the Court of Session, that it referred to tallow refined as well as unrefined, and to freemen as well as unfreemen. In the House of Lords, remitted for reconsideration, with special findings.

The question in this case was about the right of the Magistrates of Aberdeen, and their tacksmen, to impose city weigh dues on the fleshers, although they did not carry their tallow in a refined state to the market, but sold it to the chandlers in the rough, without resorting either to city weigh-house or the market. It arose out of the following circumstances:—

The town of Aberdeen had a public weigh-house, to which those, by the regulations of the burgh, who frequented the markets behoved to carry their goods, for the purpose of having them weighed, on payment of certain small duties to the magistrates or their tacksmen.

The magistrates were in the practice of making and publishing regulations and tables, from time to time, in regard

1810. to the exacting of these dues; and, on 19th April :
 STILL, &c. by their act of council, they had made up a table, an-
 v. clared, "*All tallow*, butter and cheese, brought to the
 THE "ket for sale, is liable in payment to the tacksman o
 MAGISTRATES "weigh-house, of twopence sterling per stone of tw
 OF "eight pounds avoirdupois."
 ABERDEEN, &c. The uniform practice at the city weigh-house had l
 Regulation, before and after the passing of this regulation, to ch
 Apr. 17, 1777. in regard to tallow, wrought up in a refined state, and
 ried to the market for sale, and weighed in the p
 weigh-house, the duty of twopence per stone from un
 men, and one penny per stone from burghesses. But
 tallow was allowed to remain in its natural state, or
 is called rough fat, no such exaction was ever made
 did it occur to any one that there was any just gr
 for making it. The appellants, the fleshers in Aberc
 had been in use, for many years, of disposing of
 whole fat of the animals killed by them in a rough s
 directly to the tallow chandlers, who came and bot
 and took it away from their premises; and, there
 they had no occasion to carry it to the public ma
 nor to have it weighed in the public weigh-house.
 state of things continued until the tacksmen of the m
 trates raised an action against one of the fleshers in 1
 setting forth, that this was a mere evasion of the city d
 Nov. 19, 1798. In this action, the magistrates found, that "The weigh-
 "on tallow cannot be evaded by any alteration in the n
 "of selling, if the same be regularly and timeously
 "manded, but, in respect it is affirmed by the defend
 "that those dues have not been in use of being levied
 "these several years past, *and that the pursuers have*
 "*brought any proof to the contrary*, assoilzies the defi
 "ers from the present process, reserving to the pursuer
 "prosecute the defenders for the weighing dues on tal
 "incurred since the date of citation to this process, w
 "may be considered sufficient intimation of the intentio
 "levying the dues in time coming." In January 1799,
 tacksmen instituted a new action; to which the same
 fence was pleaded as in the former; and, during its depe
 Apr. 12, 1799. ence, the magistrates made new regulations, purposely devi
 to extend their dues to "all rough fat, &c. brought to
 "market for sale, and declaring it liable in payment to
 "tacksmen of the weigh-house of twopence sterling per st
 "of twenty-eight pounds avoirdupois." And, next day,

Magistrates pronounced the following interlocutor:—Finds
 “ that the weighing dues of the tallow in question are clearly
 “ and unquestionably established by the act of council, 19th
 “ April 1777, and table produced, and cannot be evaded by
 “ now selling it in its rough state, whereas it may have
 “ formerly been in use to be sold in a molten state, if it be
 “ at all sold in the town of Aberdeen, as no distinction
 “ between rough and molten tallow is warranted by the
 “ act of council and table: Allows the pursuer to instruct
 “ that the defender was certiorated of the intention of le-
 “ vying the dues in question, by being cited in the former
 “ process mentioned in the debate, and that he has, since
 “ the date of that citation, sold within the burgh of Aber-
 “ deen, tallow to such an extent that the weighing dues
 “ thereon amount to the sum libelled.”

1810.
 STILL, &C.
 V.
 THE
 MAGISTRATES
 OF
 ABERDEEN,
 &C.

The fleshers brought a bill of suspension to the Court of
 Session, which was passed, and they superadded a declara-
 tor against the Magistrates of Aberdeen and their tacks-
 men, praying the Court to have it found and declared,
 “ That the fees and customs payable for weighing their
 “ tallow, according to the immemorial use of payment, can
 “ be exacted only on such refined tallow as the pursuers
 “ bring and sell in the public market and city, and have oc-
 “ casion to weigh with the city weights; as also, that they
 “ had no right to extend those petty customs beyond the said
 “ former immemorial practice and use of payment, or to the
 “ prejudice of the pursuers, and their right of freedom of
 “ the burgh, and ought to be prohibited from so doing in
 “ all time coming.”

This declarator having come before Lord Meadowbank,
 his Lordship repelled “ the defences, and finds and decerns Feb. 1, 1800.
 “ conform to the conclusions of the libel.” On representation,
 his Lordship adhered. On reclaiming petition to the whole May 23, 1801.
 Lords, the magistrates attempted to show, by reference to a
 series of crown charters in their favour, that they had power
 of exacting dues; but, on a more critical examination of these
 charters, the appellants alleged that the powers conferred
 had always reference to dues and customs exacted by use and
 wont, or according to the usage of the burgh. Either “ *de*
 “ *jure et consuetudine spectantibus* ;” or, “ *customis solitis,*
 “ *usitatis ac consuetis* :” or, “ *secundum usum et consuetudi-*
 “ *nem usitat. et consuet.*” And an act of Parliament, 1641, Nov. 17, 1641.
 confirmed them in those privileges that they had been in
 possession “ in any time bygone.” The appellants founded

1810. on the decisions of the Court of Session, which
adverse to the claim now made by the Magistrate
STILL, &c. deen, and alleged that the case of *Ferguson v.*
v. trates of Glasgow, which was decided later than
THE (29th June 1786, Fac. Col. vol. ix. p. 436, *et Mc*
MAGISTRATES differed materially from the present case; 1st, /
OF the town's title; and, 2d. As to the use and wont
ABERDEEN, &c. in favour of the town exacting such dues.
Boog v. Ma- The Lords pronounced this interlocutor :—
gistrates of
Burntisland, 22d Feb. 1775. “advised this petition, with the answers thereto
Wallace De- “soilzie the defenders from this action, and do
cisions, vol. “the pursuers (appellants) liable to the defen-
vii. p. 48; “penses, and ordain an account thereof to be
Tod v Magis- trates of St. “Court.” On reclaiming petition, the Court ad-
Andrew's, out prejudice to the parties being heard before
15th June Ordinary upon the quantum of the duty, and an
1781, Fac. distinction betwixt freemen and unfreemen.
Col. viii. p. 97. Mor. p. 1997.
Feb. 25, 1801. went back to the Lord Ordinary as to the qua
Mar. 11, 1801. after various procedure, and report to the
Mar. 6. 1804. Court pronounced this interlocutor :—“Repel the
“stated by pursuers against the quantum of the
“duty being twopence sterling per stone of t
“pounds avoirdupois; and find, That the said d
“ble on refined as well as unrefined tallow, an
“men as well as from unfreemen of the town c
“and find the pursuers liable for the expense o
“no other expenses, and decern.”*
- The appellants brought a bill of suspensi
Sept. 17, 1804. Cullen refused the bill.

Against these interlocutors the presen
brought to the House of Lords.

Pleaded for the Appellants.—1. The r
sold by the fleshers of Aberdeen, without t
market, or weighed in the public weigh-ho
not formerly subjected to any duty or cust
refined tallow subject to any duty, unless

* Opinion of the Judges :—

“Some of the judges thought that the reg
trates was strictly local, and could not be exte
general. But the majority of the Court held
which seemed proper in itself, would be total
modity sold by the butchers within the burgh
to be comprehended under it.”—Mor. Dic.

the public market or weigh-house. Therefore the claim now made on the part of the respondents is an unjust attempt to extend their exactions beyond the limits of former usage; and, as such, is not only unauthorized by their charters and other title-deeds, but is directly in the face thereof. 2. It is unjust, besides being illegal, to allow the magistrates of towns and burghs to impose duties and customs upon their fellow citizens of their own accord, and beyond the rights and privileges conferred on them. If such duties be necessary for the support of the body politic, it is to Parliament they must go, who alone can confer the power of laying on such additional duties.

Pleaded for the Respondents.—1. The respondents, by the common law and usage of Scotland, and by virtue of royal grants and acts of Parliament in favour of the burgh, have a right to impose and levy reasonable duties on the sale of commodities within it, to be applied to the use of the community. Such a power belongs *de jure* to all magistrates of burghs, on the footing of market dues, and as a consideration paid for the advantages of market. It is of the same nature with the right which is held to belong to every proprietor in Scotland, whose charter entitles him to “fairs and markets,” and who, it never was doubted, had a power to exact small dues for goods brought to his market, a right accordingly every day exercised. The old laws concerning the burghs show very clearly the common law right of magistrates in this matter. In the *Leges Burgorum* and *Iter Camerarii*, various passages occur respecting *Customæ*, *Tollonii*, et *Nunindinæ*, which establish the ancient common law right of magistrates to levy small duties upon commodities brought to market; and this right, which is inherent in the constitution of the Scottish burghs, was long antecedent to any special grant or charter in favour of any particular burgh. The burgh charters of the oldest date, constantly refer, as to this matter of levying customs, to “use and wont,” which supposes a right antecedent to any special grant. From the origin and nature of this right, it follows that charters in favour of a burgh, which import a right to levy customs, never specify particular rates, or articles on which they were to be exacted, that being necessarily left to the discretion of the magistrates and town council. Had it been otherwise, it would have been highly inexpedient and unpolitic, for as, from the change of times, a necessary alteration behoved to take place in the nature of the goods

1810.

STILL, &c.
v.
THE
MAGISTRATES
OF
ABERDEEN,
&c.

1810.
 ———
 STILL, &c.
 v.
 THE
 MAGISTRATES
 OF ABERDEEN,
 &c.

brought to market, and in the value of money, specific regulations, fixing either the *quantum* or the articles liable to duty, behooved to have been altered and renewed from time to time by special grants, ascertaining the precise dues on each commodity, which does not appear to have been the case in any burgh. The grants, therefore, are general giving a power to magistrates to levy custom according to *use and wont*, without specifying either the rate of custom or the goods liable. 2. But, supposing the power of magistrates of imposing *new duties* to be doubtful, there can be no doubt that they have the power of varying the mode of collection, when the former mode becomes ineffectual, by a change in the way of dealing, and generally to make regulations to prevent what is, or may be, a palpable fraud or evasion of the duty, which is just the case in the present instance. This has been decided in various cases. In one from the town of Dumfries, in August 1768, the Court of Session found the magistrates entitled to levy a duty on meal sold from private warehouses, notwithstanding that the act of Parliament seemed to limit their right to exact custom for such meal only sold in the public market, the practice of bringing it to the market having been laid aside. And this was founded on the principle, that if such a power did not belong to the magistrates, the duty would be completely evaded. A still stronger case occurred in 1784 which was most deliberately considered, and has been counted a leading one ever since. This was the case with the Magistrates of Glasgow.

Ferguson and Others v. Magistrates of Glasgow, June 29, 1786. Fac. Coll. vol. ix. p. 436; et Mor. p. 1999.

The appellants have no room to complain as to the quantum, which is both moderate and reasonable.

After hearing counsel, it was

Ordered and adjudged that the cause be remitted to the Court of Session to review their several interlocutors complained of, generally, and specially with reference to these considerations, Whether, previous to the year 1777, any payment was legally due to the tacksmen of the weigh-house for tallow brought to the market for sale, and if none was due, or less than twopence sterling per stone of 28 lbs. avoirdupois weight was due. Whether it appears from the proofs and evidence that the magistrates and town council of Aberdeen were, by law, empowered to direct a new or increased duty to be paid upon tallow brought to the market for sale; and Whether, if any such payment was legally due prior

to the year 1777 for tallow brought to the market for sale, or if they were so empowered to direct a new, or increased duty to be paid upon tallow brought to the market for sale, such prior, new, or increased duty appears, either from the meaning of the terms in which it was expressed, or from usage of payment, or upon any other grounds, to be now legally exigible upon rough fat, sold within the burgh in the houses of the inhabitants, freemen or others, and not actually brought to the market for sale. And whether it appears from the proofs and evidence that the inhabitants, freemen, or others, could be, and have been legally subjected to penalties by the magistrates and town council, for weighing, or causing rough fat to be weighed, in their houses or elsewhere, to the prejudice of the public weigh-house; and whether, upon grounds furnished by the proofs and evidence, or by law, if the inhabitants, freemen or others, contrary to any legal prohibition (if any such there be), shall so weigh, or cause rough fat to be weighed, and the same shall be sold by private contract within their houses in the burgh or elsewhere, to the prejudice of the public weigh-house, the inhabitants are not only liable to such penalties, but the same payments are also exigible upon such rough fat so weighed and sold, as are payable upon tallow brought to the market for sale? And whether by law, and upon the proofs and evidence, the magistrates and town council of Aberdeen have any right to impose a new payment or custom upon rough fat sold by private contract within the burgh, within the houses of the inhabitants, freemen or others, or to extend or increase any such payment, if any such hath been imposed, beyond the use or practice of payment, and whether by law such payment, or increased payment, would, as to the *quantum* thereof, be subject to the control of the Court of Session; and the said Court, after reviewing the said interlocutors in this cause, are to do therein as to them shall seem just and meet. And it is further ordered, That as to the interlocutor of the Lord Ordinary complained of, the same be also reviewed.

1810.

STILL, &c.
v.
THE
MAGISTRATES
OF ABERDEEN,
&c.

For Appellants, *Wm. Alexander, Thos. W. Baird.*

For Respondents, *Wm. Adam, John Burnet.*

1810.

KER, &c.

v.
INNES, &c.

(In the First Appeal.)

COLONEL (LATE BRIGADIER-GENERAL) WAL-	}	<i>Appellants</i>
TER KER of Little Dean, and RICHARD		
HOTCHKIS, Esq. W.S., his Attorney,		
SIR JAMES NORCLIFFE INNES, Bart., and	}	<i>Respondents</i>
JAMES HORNE, Esq. his Commissioner,		

(In the Second Appeal.)

JOHN BELLENDEN KER, HENRY GAWLER, and	}	<i>Appellants;</i>
JOHN SETON KARR, Esqrs.		
COLONEL WALTER KER, and RICHARD	}	<i>Respondents</i>
HOTCHKIS, Esquire,		

(Competition of Brieves).

House of Lords, 15th, 16th, and 19th June 1809; and
20th June 1810.

Case of COLONEL WALTER KER and RICHARD HOTCHKIS
Esq., Appellants in the First, and Respondents in the
Second Appeal.

First Appeal.

ENTAIL—CLAUSE OF DESTINATION—ELDEST DAUGHTER—HEIR
MALE—PRESCRIPTION.—The maker of an entail, after a series of
substitutions, conveyed his estates and dignities “to the eldest
daughter of the said umquhil Hary Lord Ker, *without division*, and
“*their heirs male*.” Lord Hary Ker had four daughters; and, in a
competition of brieves, Held, (1.) That the expression, “Eldest
daughter,” was not, according to the construction of this deed, to be
confined to the eldest born daughter, but to be construed as ap-
plicable to any of the four daughters of Lord Hary Ker, which
ever of them might be the eldest at the time the succession
opened, the whole four being, by the conception of the deed,
called successive and seriatim. (2.) There was a prior deed of
nomination (1644) which was not revoked by the later deed 1648.
In it, the destination was taken to the four daughters by *name*,
and *the heirs male of their bodies*; but, in the latter deed, the
destination was conceived to “their heirs male.” Held, that by
the conception of this latter deed, the clause, “their heirs
male,” was to be construed as calling the *heir male of the body*
of any of the four daughters, whichever of them was the eldest
daughter at the time, in preference to the heir male in general,
or collateral heir male; and that it was competent, though not

necessary, to refer to the previous deed in aid of that construction. (3.) The investitures, subsequent to the deed 1648, instead of being conceived to the eldest daughter of Hary Lord Ker, and "*their* heirs male," had dropped the word "*their*," and substituted "*her* heirs male," and prescription had run upon the title so made up. Held, That the Court was still entitled to give effect to what was conceived to be the true import of the deed 1648, in favour of "*their* heirs male," more especially as a subsequent deed (1747), had expressly referred to and adopted the destination in the deed 1648.

1810.

 KER, &c.
 v.
 INNES, &c.

In the beginning of the 15th century, Andrew Ker of Altonburn was the head of a distinguished family of that name, on the southern border of Scotland. He had three sons, Andrew, James, and Thomas, from whom respectively descended the Kers of Cessfurd, and thence the Kers of Fawdonside, of Caverton, and of Dolphinstone, &c. From the Cessfurd branch sprung the Roxburghe family. In 1480 Walter Ker was the head of the Cessfurd family. He had two sons, Robert, afterwards of Caverton, and Mark, afterwards of Dolphinstone and Littledean. The appellant was a direct male descendant of Mark.

It also appeared, from the feudal investitures of the family estates of Ker of Cessfurd, during upwards of a century prior to 1573, the principle and rule of succession in the *male line* had been invariably adhered to; and the limitations in these investitures, the appellant stated, served to exhibit, from time to time, this prevailing rule of succession in the male line.

At this time, William Ker of Cessfurd had two sons, Robert and Mark. Mark died without issue; but Robert, the eldest son, in 1573, during the lifetime of his father and grandfather, (Sir Walter Ker), was feudally invested with the estates, and, after their deaths, became Sir Robert Ker of Cessfurd. He enjoyed his paternal inheritance under the charter 1573, during a very long life. After having obtained the honour of knighthood, he was, in 1606, raised to the dignity of a Lord of Parliament, and, in 1616, created by patent Earl of Roxburghe, with a remainder to his heirs male. He was twice married. By his first wife he had a son, William, Master of Roxburghe, who died before him without issue, and three daughters, all of whom were married, and had issue. By his second wife he had a son, Harry, Lord Ker, who also died before him, leaving four daughters, but no male issue.

1573.

1810. Robert, first Earl of Roxburghe, died in 1650, in extrem old age.

KER, &c.
v.
INNES, &c.

It was contended by the appellant, that under the investitures, which had subsisted in his family for nearly two centuries, and by virtue of the limitations contained in the patent of his peerage, the estates and honours of Roxburghe would have devolved, at Earl Robert's death, first upon John Ker, the only remaining male descendant of Mark, Commendator of Newbattle, who died without male issue about the year 1660, and afterwards upon Sir Walter Ker of Fawdonside, the only remaining male descendant of George Ker of Fawdonside, who also died without issue about the year 1644.

The next in propinquity to those two branches, were the descendants in the male line of Mark Ker of Dolphinstone from whom the appellant was descended. Thus, more than a century and a half ago, the succession, both under the investitures and the patent, would have opened to the branch now represented by the appellant, Colonel Ker.

Change of Investitures.

But Robert Ker, Earl of Roxburghe, at a very advanced age, departed from this order of male succession, which had been so long established in the house of Cessford, a step suggested to him, it was supposed, by the situation of the family. His sons having died without male issue, if the destination had remained unaltered, all his descendants, whom he lived to see a numerous train, would have been excluded without exception from the inheritance. He had three daughters and four grand-daughters, the issue of his deceased son Harry, Lord Ker. He conceived the project of uniting in marriage some of the progeny of his son with the issue of his eldest daughter, that the introduction of an heir-female might be compensated for by a double connection with the ancient line.

1643. In order to carry his purpose into execution, the Earl of Roxburghe, 16th July 1643, granted four procuratories of resignation, comprehending his honours, and all his estates, for new investiture, to be given to himself, and the heirs male to be lawfully procreated of his body, "which failing, to his heirs and assignees in his option, to be designated, nominated, made and constitute by him at any time in his lifetime, or before his decease, by assignation, designation, or declaration, under his handwrit, and under the provisions, restrictions, limitations, and conditions therein to be contained."

Nov. 3, 1643. In the same year he granted a bond, proceeding upon a

narrative of those procuratories of resignation, by which he obliged his "*heirs male, as well gotten of his own body as his heirs male of tailzie and provision whatsoever*," to ratify them in favour of the heirs whom he should nominate, and to renew them in case of his death, without having completed his proposed investiture by charter and infeftment.

1810.

KER, &c.
v.
JAMES, &c.

In 1644, before he had expeded any such charter, he executed a deed of nomination, designation of tailzie, which contained a power of revocation.

Deed of Nomination and Tailzie 1644.

In 1646, he obtained a charter, in consequence of his former procuratories of resignation, by which his honours and estates of Roxburghe were granted to himself, and the heirs male of his body; whom failing, to the *heirs or assignees* whom he should nominate *by a future deed*, at any period of his life. The appellants strongly contended that this necessarily implied that his former nomination of 1644 was revoked and abandoned; while the respondents, on the other hand, denied this, and contended, that as there was no express revocation of the deed 1644, it was still competent, in construing the deed of nomination and tailzie 1748, to refer to that deed, in order to explain the destination in question. The grant of the charter is in these words:—

Charter of Earldom, 1646.

"Hereditibus suis vel assignatis quibuscunque in ejus optione designandis nominandis vel constituendis per ipsum aliquo tempore in vita sua vel ante ejus decessum per assignationem, designationem, nominationem seu declarationem sub sua subscriptione ac sub provisionibus restrictionibus, limitationibus et conditionibus in dicta nominatione et designatione, continendis."

A second charter, referring to the former, and in favour of the same series of heirs, was expeded in 1647, for the purpose merely of including certain lands which had been omitted in the charter of the earldom.

Second charter of lands omitted. June 21, 1647.

The future nomination and tailzie to which these charters referred, was executed in 1648; but, before reciting it, it is necessary to elucidate the points here in dispute, and to refer to the deed of nomination and tailzie in 1644, alleged to have been revoked.

In order to elucidate more clearly the limitations and conditions in those deeds, the following account of his family is necessary. By his first marriage he had, besides his son William, who died without issue, three daughters, Lady Dudhope, Lady Perth, and Lady Southesk, all of whom, both in 1644 and in 1648, were alive, and had issue. Lady Perth had four sons, the youngest of whom was named Sir William Drummond; and two daughters, of

1810. whom the eldest was married to John Lord Fleyming, afterwards third Earl of Wigton, by whom she had several sons and the second to Lord Tullibardine, of which marriage there was likewise issue. By his second marriage, the Earl of Roxburghe had one son, Harry, Lord Ker, who died before him, leaving four daughters, Jean, Anna, Margaret, and Sophia. The destination in the first deed of nomination 1644 ran thus:—

Deed of Nomination and tailzie, 1644.

- By the first deed of nomination and tailzie, the Earl of Roxburghe, to the exclusion of all his daughters, and of the issue of the younger two, selected Sir William Drummond fourth and youngest son of Lady Perth, and Robert Fleming, second son of Lord Fleming, with all his younger brothers, procreated or to be procreated of the marriage and the heirs male of their bodies, to take the estate and honours successively, in the manner and under the condition specified in the following clause:—“ And we being willing
“ to make the said designatione and nominatioune of the
“ persons to succeed to us in our said estate and living
“ Thairfor witt ye us of certain knowledge and proper measures
“ to have designat nominat maid constitute and be the
“ persons designs nominates makes and constitutes Sir William
“ liam Drummond, son to the Right Honourable John
“ Earl of Perth, and the aires maill lawlie to be gotten
“ of his bodie to be the person wha sall succeed to us
“ in our saidis lands baronies estate and living content in
“ the saids pröries (procuratories) and infestments following
“ or to follow yrupoune (failzeing of aires maill lawlie to be
“ gottine of our own bodie) always under the provisiounes restrictions
“ strictiones limitationes and conditiones after spect and
“ na otherways. And failzing of the said Sir William Drummond
“ and his aires maill foresaid or in their not observing
“ keeping fulfilling of the samyne provisiounes restrictiones,
“ limitationes and conditiones afterspect We have designit
“ and by thir pnttis designes nominates makes and constitutes
“ Fleyming second son to John Lord Fleyming and Dame Jane Drummond his spouse
“ and the aires maill lawlie to be gottine of his bodie, to
“ be the person wha sall succeed to us in the saids landes
“ baronnies estate and living conteint in the saides pröries
“ (procuratories) and infestment following or to follow
“ yrupoune always also under the samyne provisiounes limitationes
“ restrictiones and conditiones afterspect and na otherways. And failzing of the said Fleyming
“ second son and the aires maill to be gottine of his bodie
“ or in cais of thair not fulfilling observing and keiping of

" the samyne provisiounes restrictiounes limitations and
 " conditiones afterspect We have maid constitute designit
 " and nominate and by thir pnttis makes constitutes designes
 " and nominates Fleyming third son to the said Lord
 " Fleyming and Dame Jeane Drummond his lady and the
 " aires maill lawlie to be gottine of his bodie to be succes-
 " sors to in our said estate lands baronnies erldom and
 " others abovewrn conteint in the saides pröries and infest-
 " ments to follow yrupon always under the provisiounes
 " restrictiounes and conditiones afterspect and na other-
 " ways. And failzeing of the said Fleyming third
 " son foresaid and the aires maill lawlie to be gottaine of
 " his bodie, or in thair not observing keiping and fulfilling
 " the saides provisiounes limitatiounes and conditiones
 " afterspect We have maid designit and nominat and be
 " thir pnttis designes and nominates Fleyming fourt
 " sone of the said Lord Fleyming and Dame Jane Drum-
 " mond his lady and the aires maill lawlie to be gottaine of
 " his bodie to be successors to us in our estate lands bar-
 " ronies and others abovewrn conteint in the said pröries
 " and infestments following or to follow yrupon alwayes
 " under the provisiounes and conditiones following and no
 " otherwayes viz. That the said Sir William Drummond
 " and failzeing of him be deceis the said Fleyming
 " second son foresaid of the said Lord Fleyming and failze-
 " ing of him be deceis the said third sone of the said Lord
 " Fleyming and his lady and failzeing of him be deceis the
 " said fourt sone of the said Lord Fleyming and his lady
 " sall marie and tak to thair lawll spouse Lady Jeane Ker
 " aldest lawll dochtor of umql Hary Lord Ker our sone
 " and failzeing of her be deceis or by any other occasion
 " qlk may failzie on hir pairt Lady Margaret Ker secound
 " daughter lawll dochter of the said umql Hary Lord Ker our
 " sone. And failzeing of the said Lady Margaret Ker be deceis
 " or by any other occasion on hir pairt Lady Anna Ker
 " third lawll dauchter of the said umqll Hary Lord Ker our
 " sone. And failzeing of the said Lady Anna Ker be deceis
 " or be any other occasion qlk may fall out on hir pairt
 " Lady Sophia Ker youngest lawll dochtor of the said umqll
 " Hary Lord Ker."

1810.

KER, &c.
 v.
 INNES, &c.

After inserting other conditions and restrictions which Second clause
 were to be obligatory on the substitutes, the deed continues of destination.
 in the following terms:—" And in caise it sall happen all
 " the foresaides personnes particularlie before namitt ap-
 " poynted to succeed to us in manner foresaid to depart this
 " lyffe without aires maill lawlie gottine of yr awne bodies

1810. " on lyffe they mareing as sd is Or sitt give they sall all
 " fail in the observing and fulfilling of the conditionnes
 KER, &c. " above and after mentionat set down to be performit be
 v. " them Thaine and in ather of these cases We have de-
 INNES, &c. " signet nominat and appoynted, and be thir pntts signes
 " nominattes and appoyntes *the immediate next eldest lawful*
 " *sones of the saides John Lord Fleyming and Dame Jeanne*
 " *Drummond his Lady, being immediatelie next in birthe to*
 " *thair eldest sone and aire ilk ane of them successivē after*
 " *uyrs* To be the personnes wha sall succeed to us in our
 " sd estate landes baronnies and uyrs abovespect. They—
 " alwayes mareing and taking to yr lawll spouse the eldest—
 " lawll dochter of the sd Lord Ker, our sone, being on lyffe—
 " and unmarried for the tyme. And they and yr aires mail—
 " foresaid of the said mareadge keipand performand ane—
 " fulfilland the haill remanent conditionnes of this pnt no—
 " minatioun. And falzeing of all the before namit person—
 " nes be deceis or not performance of the forsd conditionnes—
 " In that caise we have designit and be thir pntts designes
 " the saides *Lady Jeane, Margaret, Anna and Sophia Ker*—
 " *our oyes. And failzeing of the first the next immediate*
 " *eldest of the sds dochters successivē after uyrs and yr aires*
 " *maill lawlie to be gottine of yr bodies to be the personne*
 " *wha sall succeed to us in our sds landes baronnies, or Le-*
 " *dom and uyres abovevurn.* They always mareing and
 " taking to yr lawll spouses ane gentelman of the name of
 " Ker of lawll and honoll descent and yr saides husbands
 " and yr aires forsd taking keiping and reteining the sd
 " surname of Ker, and arms of the sd house of Roxburghe
 " allenarlie in all tyme yrafter. As also performand the re-
 " manent conditionnes of this pnt nominatioun. And false-
 " ing also of all the sdes personnes be deceis or not perfor-
 " mance as said is In that case we have designit and be
 " thir pntts signes and appoyntes *our narrest and lawll*
 " *air maill qtsomever* being ane gentleman of the name of
 " Ker of lawll and honoll descent and the aires maill lawlie
 " to be gottine of his bodie To be the person to succeed to
 " us in our said estate landes baronnies living and other
 " abovevurn." To these destinations were subjoined the
 " usual prohibitions against alienation, contraction of debt,
 " and granting deeds in prejudice of the order of succe-
 " sion. A power to revoke or alter was also inserted. The
 " deed purported to have been written by Alexander Don-
 " clerk, Kelso. Various blanks had been originally left in it,
 " some of which were afterwards filled up in the handwriting
 " of the Earl of Roxburgh, and in that of Alexander Don.

In this deed too, by mistake apparently, Lady Margaret is called the *second* daughter of Lord Hary Ker, when, in fact, she was the third daughter, and, in like manner, Lady Anna was called his third daughter, when, in fact, she was his *second*.

1810.
KER, &c.
v.
INNES, &c.

It was stated that this deed was revoked by the charters in 1646 and 1647, but this, as has been already mentioned, was denied by the respondent, who alleged it was merely superseded, and a new nomination and tailzie substituted in its place in 1648, upon which all the subsequent investitures of the family were made.

The first clause of destination in the deed 1648, with the conditions which affect it, was thus expressed:—"There-
fore wit ye us of certane knowledge and proper motive to
have made nominate declared and constitute and by
thir pnts makes nominates declares and constitutes (failz-
ing of aires male lawfully to be gottin of our awin bodie)
upon the provisions restrictions and conditions always
after specified the persons after mentionat in manner
after specified to be airis of tailzie to us and successors in
our saids erledom lands lordship baronies titles dignity offi-
ces jurisdictiones patronages and others qtsomever contain-
it in the infestments pröries and others richtis and secu-
rities generally and specially above written viz. Sir Wm.
Drummond youngest lawful sone to an Noble Erle John
Erle of Perth &c. and the aires male lawfully to be gotten
of his body with his spouse after mentionat To be heir
of tailzie and successor to us in the saids erledom titill
dignity lands lordship baronies and others above speci-
fied ; Qlks failzying or in case the said Sir William Drum-
mond or the saidis heirs male of his body sall failzie to
observe the provisions restrictions and conditions after
specified In ather of the saidis cases we nominate declare
and constitute Robert Fleyming second lawful sone to
John Lord Fleyming and Dame Jeane Drummond, his
lady, and the airis male of his body to be gottin with his
spouse after nominate To be heir of tailzie and successor to
us in the said erldom title dignity lands lordship ba-
ronies and others above written Qlks failing, or in case
the said Robert Fleyming and the saids airis male of his
body sall fallzie to observe the provisions restrictions and
conditions after specified In ather of the saidis cases we by
thir presents make nominate declare and constitute
Fleyming third lawful son to the said John Lord Fleyming
procreate betwixt him and his said lady and the airis
male lawfully to be gottin of his body with his spouse

Deed of no-
mination and
tailzie 1648.
First clause of
destination.

1810. " after nominate To be heir of tailzie and successor to us
 " the said earldom title dignity lands lordships baronies
 " and others above specified Qlks also failing or in case
 " the said Fleyming third sone foresaid and th
 " saidis airis male of his body sall failzie to observ
 " the provisions restrictions and conditions after specifie
 " In ather of the saidis cases we be thir presents mak
 " nominate declare and constitute Fleyming fourt
 " lawful sone to the said John Lord Fleyming and his sai
 " lady and the aires male lawfully to be gottin of his bodi
 " with his spouse after nominate To be heir of tailzie an
 " successor to us in the saids erledom title dignity land
 " lordship baronies and others above written. And failzin
 " of the airis male of all the saidis four persons their bodie
 " with their spouses after nominate or otherwise in cas
 " they all or their saidis airis male sall all failzie to perfor
 " the provisions restrictions and conditions after mentions
 " In ather of the saidis cases we by thir presents nominat
 " declare and constitute the next immediate eldest lawft
 " sones of the said Johne Lord Fleyming procreate or to b
 " procreate betwixt him and the said Dame Jeane Drun
 " mond his Lady and the airis male lawfully to be gottin c
 " their bodie with their spouses respectivè after nominat t
 " be airis of tailzie and successors to us in our saids erledor
 " lands lordship baronies title dignity and others abov
 " written under the express provisions restrictions and cor
 " ditions after specified viz. That in case it sall happen th
 " saids persons nominate by us or onie of them quha sa
 " have right to succeed for the time to be married upc
 " any other spouse than the spouse hereby nominate be
 " in manner after mentionat In that case the person
 " persons sua otherwise to be married and the airis male
 " his body is and shall be excludit from the said tailzie an
 " succession and sall have na right thereto without an
 " declarator or process of law to be suted or cravit there
 " anent. And Als providing that the said Sir William
 " Drummond and failing of him by decease, or in case o
 " his marriage, or not observing of the conditions above and
 " after mentionat the next person havand right for the time
 " to succeed as said is sall marry and take to thair lawful
 " spouse Lady Jeane Ker eldest lawful dochter to unql
 " Hary Lord Ker our sone, they being baith marriageable
 " for the time. In qlk case he or that person having right
 " to succeed for the time sall be halden to marry the said
 " Lady Jeane Ker before he be servit and retourit air of

KER, &c.
 v.
 INNES, &c.

“tailzie to us. And in caice they be not baith marriageable
 “In that caice it sall be lawful to the said Sr Wm or our
 “next succeeding air to obtain himself servit retourit and
 “infest as air of tailzie foresaid bot withal sall be halden
 “astricted and obleist to marry the said Lady Jeane Ker
 “qn they sall be marriageable thereafter. And failing of
 “hir by decease before marriage or that the said Lady
 “Jeane Ker be unwilling or refusis to marry or be married
 “to ony other spouse In ather of the saids caices the said
 “person quha sall have right to succeed for the time sall be
 “halden and obleist to marry and take to his spouse Lady
 “Anna Ker second lawful dochter to the said umql Hary
 “Lord Ker qn they sall be marriageable. And failing of
 “her by decease or that the said Lady Anna Ker be un-
 “willing or refuse to marry or be married to onie other
 “spouse In ather of these caices the said person quha sall
 “have right to succeed for the time sall be halden to mary
 “Lady Margaret Ker third lawful dochter to the said
 “umql Hary Lord Ker our sone. And failing of hir by de-
 “cease or in caice she refuse or sall happen to be married
 “to onie other spouse he sall be halden to marry Lady
 “Sophia Ker youngest lawful dochter to the said umql
 “Hary Lord Ker our sone And sicklike it is providit, That
 “in caice it sall happen all the foresaids persons to qm our
 “saids airis of tailzie respectivè are appointed by us to be
 “married to depart this life or be all married before the said
 “airis of tailzie respectivè sall fall to succeed to our said
 “estate and living or zitt in caice they sall all refuse to
 “marry our saids airis of tailzie and provision specially and
 “generally above mentionat In that caice the persons and
 “airis respectivè nominate by us in manner foresaid are
 “hereby declarit be us na ways to amit bot to have and en-
 “joy the benefit and right of tailzie and succession they
 “always marrying persons of honourable quality and lawful
 “birth and withall keepand observand and fulfilland the
 “remanent otheris conditions provisions and restrictions
 “before and after mentionat and na otherwise.”

Other conditions and restrictions followed, which were secu-
 ed by prohibitory, irritant, and resolute clauses necessary
 o constitute a strict entail.

A second clause of destination was then inserted, on the ^{Second clause}
 construction of which the question between the parties in ^{of destination.}
 his appeal exclusively depends: “And qlks all failzeing be
 “decease or be not observing of the provisions restrictions
 “and conditions above written The right of the said estate

1810.

KER, &c.

INNES, &c.

1810. "sall pertain and belong to the eldest dochter of the said
 —————
 KER, &c. "umql Hary Lord Ker without division and yr aires-male
 v. "she always mareying or being married to ane gentleman
 INNES, &c. "of honourl and lawful descent wha sall perform the condi
 "tions above and under written Qlks all failsing and yr ad
 "airis-male to our nearest and lawful airis-male qtsomever."

Then followed conditions relative to debts, and serving under the tailzie,—a conveyance of other subjects,—provisions to three of Lord Henry Ker's daughters.

It was alleged by the appellant, as material to observe in considering his case, that this deed was framed by John Learmount, writer to the Signet, that it had several blanks which were afterwards filled up by Alexander Don, clerk — Kelso, by whom the deed of nomination 1644 was written.

On comparing these two deeds of nomination and tailzie, that of 1644 with that of 1648, two important distinctions were said to be observable. In the first clause of destination in the deed 1644 Sir William Drummond and the younger sons of Lord Fleming are called, under the condition of marrying agreeably to the entailer's injunctions, and the *heirs male of their bodies respectively*; consequently, if they fulfilled that condition, the *heirs male of their bodies* by any subsequent marriages would have been, according to the appellant, admitted. But, by the corresponding clause in the deed 1648, the destination is limited to the *heirs male of the prescribed intermarriages*. Again, in the second clause of destination in the deed 1644 *each of the four daughters of Hary Lord Ker is called by name*; they are called in succession, and the substitution is limited to the heirs male of their bodies. Whereas in the corresponding clause of the deed 1648, the daughters of Lord Hary Ker are not called by name, but the destination is confined to the eldest daughter of the said deceased Lord Hary Ker, *without division*; and the succession, instead of being limited to *heirs male of their bodies*, is *extended to heirs male*.

Parliamentary ratification of the Charter 1646, and infestment as to the lands and dignities. As already mentioned, there was a parliamentary ratification of the charter 1646 and the infestment which had followed; declaring "that any nomination or designation made, or to be made, by the said Earl of Roxburghe, of any person, or persons, to succeed to him as heirs of tailzie in the said lands, baronies, and earldom of Roxburghe, title and dignity foregoing, or of any other of his Lordship's lands or others belonging to him, shall be also valid and sufficient," &c. In virtue of this, the deed 1648 was executed.

Subsequent investitures.

Upon the death of Robert, Earl of Roxburghe in 1660,

Sir William Drummond made up titles to him by service as heir of tailzie and provision, and afterwards obtained a charter of confirmation and novodamus, on which he was infeft.

1810.

KER, &c.

v.

INNES, &c.

1655.

In compliance with the injunctions of the entail, he married, in 1655, Lady Jeane Ker, daughter of Lord Hary Ker. To give still greater validity to his title, he obtained a decree of adjudication in implement on the bond granted by Earl Robert in 1643. In 1661 he procured a parliamentary ratification of the deed of nomination 1648; and, two years afterwards, it was likewise ratified by Sir Walter Ker of Fawdonside, who had then become heir male of the Kers of Cessford, and, consequently, heir under the ancient investitures.

Sir William Drummond thus became William, second Earl of Roxburghe. He had two sons by his marriage with Lady Jeane Ker. Robert, who succeeded him in 1665, and John, who was afterwards Lord Bellenden Ker. Robert, third Earl of Roxburghe, was succeeded by his sons, Robert and John, fourth and fifth Earls of Roxburghe. All these heirs of entail completed their feudal titles to the estate, in terms of the deed of tailzie 1648.

1665.

In 1707, John, fifth Earl of Roxburghe, obtained from Queen Anne a patent, granting "to him, and to the heirs male of his body; whom failing, to his other heirs destined to succeed to the title and dignity of the Earl of Roxburghe, by the former patents or diplomas heretofore made and granted to his predecessors, the title of Duke of Roxburghe, Marquis of Bowmont," &c.

New Patent of Nobility 1707.

Destination in do.

In 1729 John, first Duke of Roxburghe, executed a disposition of his estates, in which, proceeding expressly upon the narrative of the deed of nomination and tailzie 1648, he "gives and disposes these estates to Robert, Marquis of Bowmont, my only son, and the heirs male lawfully to be procreated of his body, which failing, to the other heirs of tailzie substituted to them, contained in the said tailzie made by the deceased Robert, Earl of Roxburghe, my great-grandfather's father, and in my said infeftments thereupon; all which heirs of tailzie are held as herein insert and expressed; which failing, to me, my heirs and assignees whatsoever."

1729.

Having relieved the estate of certain incumbrances, and acquired other lands, the Duke of Roxburghe, in 1740, executed another deed of entail of those lands; but, in like manner, "under the several provisions, conditions, limitations, restrictions and irritancies therein mentioned contained in the deed of tailzie of the said estate of Rox-

1740.

1810. *KER, &c.*
v.
INNES, &c. 'burghe granted by the said deceased Robert, Earl of Roxburghe, his great-grandfather's father, bearing date "23d Feb. 1648." In this deed the lands were disposed to his son Robert, Marquis of Bowmont, and the other heirs male of his body; and to his brother german, Lieutenant-General William Ker, and the heirs male of his body; "whom failing, to the other heirs of tailzie substituted to them, contained in the said entail of the said estate of Roxburghe, made and granted by the deceased Robert, Earl of Roxburghe, my great-grandfather's father, and in the infeftments following thereon; and which heirs of tailzie are held as herein expressed."
1741. In 1741 Robert, second Duke of Roxburghe, succeeded to his father, and completed his investiture by executing the procuratories contained in the two deeds last mentioned; by virtue of which he afterwards expedited a charter from the crown in favour of the heirs named in the entail 1648. The clause in this charter contained in the substitution in favour of the eldest daughter of Hary, Lord Ker, is
 Charter 1741. conceived in the following terms:—"Et quibus omnibus deficien. per decessum at et per non observantiam seu prestationem provisionum, restrictionum et conditionum supra script. jus dict. status et patrimonii per dict. literas talliæ declaratur cadere, devolvere et pertinere *ad filiam Natu Maximam quondam Henrici Domini Ker filii Roberti primi Comitis de Roxburghe*, absque divisione, et ad ejus heredes masculos, illa omni modo obligata nubere seu nupta esse generoso viro præclari et legitimi stemmatis, qui omnes conditiones supra script. perimplebit: Quibus omnibus deficien. ad præfati quondam Roberti primi Comitis de Roxburghe, propinquiores et legitimos hæredes masculos quoscunque; *et per præsentes providetur et declaratur, quod eadem iis cadent et devolvent conformiter.*"
- New Entail of 1747. In 1747 Robert, second Duke of Roxburghe, executed new entail of his whole estate, founded upon the preceding entails, and exactly similar in its limitations and conditions. And under this deed John, third Duke of Roxburghe, succeeded to his father in 1755, and in 1756 completed his investiture.
- Death of 3d Duke of Roxburgh, March 1804. He died in March 1804, without issue, and, consequently the male line of Robert, third Earl of Roxburghe, whereupon the succession opened to William, Lord Fden, who was grandson of John Bellenden, second William, second Earl of Roxburghe, and only remaining male descendant of the marriage between Sir William

mond and Lady Jeane Ker, the eldest daughter of Hary, Lord Ker. Under the entail 1747 he made up a feudal title, by special service and infeftment.

1810.

KER, &c.

v.

INNES &c.

William, fourth Duke of Roxburghe, when he succeeded, was far advanced in life. He had no issue, and in him was to terminate the line of Drummond, which had been intruded into the house of Cessfurd. The line of Fleyming, also conditionally called by the nomination 1648, had for a considerable time been extinct. The whole series of heirs female, for which the first Earl of Roxburghe had shown a predilection, being thus exhausted, the inheritance, according to his settlement, and every subsequent entail raised upon it, was, as the appellant stated, to be restored to the heir male general of the eldest daughter of Lord Hary Ker, that is Lady Jeane Ker, and the fee replaced and secured in the channel of that investiture by which its descent had been regulated for a period of two hundred years.

William, fourth Duke of Roxburghe, died at Fleurs on the 22d day of October 1805.

The appellant was a male descendant of the house of Claims of the Cessfurd, and claimed as heir male general to Robert, first Earl of Roxburghe, and heir male general to his son Hary, Lord Ker. He stated that Walter Ker of Cessfurd, in 1480, had two sons. Robert of Caverton, the eldest; and Mark Ker of Dolphinstone, the youngest. That Lady Jane Ker, who was married to Sir Wm. Drummond, was descended in a direct line from Robert Ker of Caverton, the eldest son, and after the extinction of her heirs by her marriage with Sir Wm. Drummond, he, as being the heir male of Mark Ker, in a direct line, was entitled to succeed, as heir male general, both to her and to Lord Hary Ker. He also claimed as heir male whatsoever under the destination in the deed 1648, on the assumption that the destination was confined to the "eldest daughter" of Hary Lord Ker and her heirs male.

competing parties.

Sir James Norcliffe Innes contended that the terms "eldest daughter" were not to be confined solely to Lady Jane Ker, but included the other three younger daughters of Hary Lord Ker; and he therefore claimed as heir male of the body of Margaret, the third daughter of Hary Lord Ker, alleging that his great-grandfather was the eldest son of Sir Robert Innes of Innes, who was married to the said Margaret, and therefore that he was the heir male of the body of his great-grandmother Lady Margaret Ker. He also offered to prove that there

1810. were no heirs male of the bodies of Ladies Jean and Anna alive.

KER, &c.
v.
INNES, &c. Mr. Bellenden Ker claimed through William, last Duke of Roxburghe, who had been, previous to his accession, of the younger branch of the family, under the title of Lord Bellenden. Lord Bellenden was descended of John, the youngest son of Sir Wm. Drummond (second) Earl of Roxburghe. He stated, that at the time of the late Duke's succession, the nearest relations of the former Duke (John) were his sisters, Lady Essex Ker and Lady Mary Ker, the heirs of line of the elder branch of the family; and Mr. Bellenden Ker, who was the eldest son of the Honourable Mrs. Gawler, who was the eldest daughter of John, the third Lord Bellenden, grandson of Sir William Drummond and Lady Jean Ker. He was therefore the great-great-grandson of these parties, and, on failure of Lady Essex and Lady Mary Ker, was the heir of line of the family. He, besides, contended that the last Duke of Roxburghe (Duke William) being the last member of the tailzie of the Drummond line, by the marriage with Lady Jean Ker, the eldest daughter of Lord Hary Ker, and under the assumption that the destination was confined to her alone, as "eldest daughter," he was entitled to execute the new entail in his favour, because he then held the estates in fee simple, unburdened and unfettered in favour of any other heirs.

Change of previous investitures by him.

Accordingly, and before Duke William's death, he had granted, in June 1804, certain deeds, intended to change entirely the previous investitures, by disposing the estate to a second cousin of his own, John Bellenden Gawler, Esq., now John Bellenden Ker. This was effected by the Duke executing a conveyance in the form of a trust disposition of the estates, with a relative deed of entail, limiting the succession, in the first instance, to Lady Essex Ker and Lady Mary Ker, sisters of John, Duke of Roxburghe, and, after their death, to Mr. Bellenden Ker and his brother Mr. Gawler, and the heirs of their bodies. In September 1804 he granted to Mr. Bellenden Ker sixteen feu dispositions, comprehending the absolute property of the whole estate, which is the subject of an after appeal.

He, in January 1805, made a new settlement, revoking the former destination to the sisters of his predecessor, and limiting the succession, on failure of himself, and the heirs of his body, to Mr. Bellenden Ker and the heirs of his body. Lastly, he executed in June 1805 a third entail, conveying

the estate directly to Mr. Bellenden Ker, and the heirs of his body, whom failing, to a series of substitutes, under a declaration of nullity in case any descendants of his own body should exist at the time of his death.

1810,
KER, &c.
v.
INNES, &c.

The appellant conceiving himself entitled, by the failure of the prior substitutes, to enter into the possession of the estate as heir of tailzie, empowered a person to demand admittance in his name to the mansion house of Fleurs, and this being refused, he presented a petition to the Sheriff Depute of Roxburghshire, for the purpose of obtaining judicial authority to enforce his claim. To this petition answers were put in on the part of Mr. Bellenden Ker and the trustees.

Pending these proceedings, a petition was presented to the Court of Session by the respondents, Sir James Norcliffe

Present ac-
tions.

Innes, Bart., late of Innes, in the county of Moray in Scotland, now of Innes House in the county of Devon, claimant of the estates and honours of the family of Roxburghe, and James Horne, Writer to the Signet, his commissioner. His claim set forth, that he was the heir male of his great-grandmother, Lady Margaret Ker, third daughter of Hary Lord Ker, and, in that character, entitled to succeed to the honours and estates of Roxburghe, under the clause of destination in the entail 1648, in favour of the heirs male of the eldest daughter of Hary Lord Ker; and as he was about to take the necessary steps for establishing his right, he prayed the Court to award sequestration of the estate until the issue of his competition with the other claimants. Answers were put in by Mr. Bellenden Ker and the trustees, and the proceedings before the Sheriff were advocated *ob contingetiam*, and an interlocutor was pronounced, sequestrating the estates. Against these interlocutors appeals were taken to the House of Lords, which are now in dependence.

Sequestration
of estates
pending com-
petition.

In the meantime, the appellant, Colonel Ker, proceeded to obtain himself served heir of tailzie to the late Duke of Roxburghe, a character which he conceived himself to possess, in consequence of his previous services expedite as already referred to.

Sir James Norcliffe Innes having likewise purchased Competition of briefes. briefes for serving himself heir of tailzie and provision to the deceased, a competition arose between them, in which, on the application of both parties, the Court of Session appointed four of their number to be assessors to the ma-

1810. In this competition, appearance was made for Mr. Bellenden Ker and the trustees of the late Duke of Roxburgh who insisted that they had both right, title, and interest, to be heard as parties in the services, upon the ground that they stood infeft in the estates of Roxburghe, which the claimants were severally claiming to be served heirs in special. This demand gave rise to a debate of some length before the Court of Macers and their Assessors. In the court, another discussion arose, in consequence of Sir James Norcliffe Innes having, contrary, as was alleged, to all established form and practice, insisted, that before it was determined which of the two competitors had a title to be served heir of tailzie, or, in other words, what was the legal construction of the subsisting investitures of the estate, a jury should be called, and evidence of the propinquity of each of the competitors laid before them for their verdict.

The appellants, on the other hand, objected to this mode of procedure, as an inversion of the established procedure of the Court; that it was inexpedient to investigate fact before their relevancy be tried; and that the previous decision of the question of law would shorten the cause, and relieve one competitor from proving an unavailing propinquity.

After parties had been heard on both points, the Court of Jan. 20, 1806. Macers pronounced the following interlocutor:—"The
" Macers having heard the above debate, and advised with
" the Lords' Assessors, they make avizandum to the Lords of
" Council and Session therewith; and appoint the questions
" with regard to the form of proceeding in the service, as
" also of the competency of Mr. Bellenden Ker, Gawler,
" and Seton Karr, being allowed to appear to be heard as
" parties in this service, to be stated to the said Lords of
" Council and Session, in memorials to be reported by the
" Lords' Assessors for that purpose; and appoint the memorials to be boxed on or before the 31st January instant."

In consequence of this order, memorials were presented to the Court of Session by all the three parties; upon advising which, this interlocutor was pronounced:—"Upon Feb. 14, 1806.
" report of Lord Hermand, and having advised the mutual
" memorials for the parties, the Lords remit to the Macers,
" with an instruction to find, *Primo*, That John Bellenden
" Ker, and Henry Gawler, and John Seton Karr, Esqrs.,
" have a title to appear in the services of Brigadier-General
" Ker, and Sir James Norcliffe Innes, Bart., and to be heard

" for their interest ; and, *Secundo*, That the points of law,
 " with respect to the construction of the tailzie and settle-
 " ments of the estates of Roxburghe, must, in the first place,
 " be determined ; and, for that purpose, recommend to the
 " Macers to hear counsel for the parties, and to proceed
 " otherwise in the cause as to them shall seem proper."

1810.

KER, &c.
 v.
 INNER, &c.

The Court of Macers accordingly pronounced this inter-
 locutor :—" The Macers having considered what has been
 " respectively stated by the counsel for the parties in the
 " mutual briefs before mentioned, and advised with the
 " Lords' Assessors, they, in terms of the aforesaid interlocu-
 " tor of the Lords of Council and Session, find, *Primo*, That
 " Messrs. Bellenden Ker, Henry Gawler, and John Seton
 " Kerr, have a title to appear in the services, and to be
 " heard for their interest. And, *Secundo*, That the points
 " of law, with respect to the construction of the tailzie and
 " settlements of the estate of Roxburghe, must, in the first
 " place, be determined ; and, in order thereto, make aviz-
 " andum to the Lords of Council and Session with the case,
 " in order to be reported to their Lordships by the Lords'
 " Assessors, *quam primum*, for their opinion and direction ;
 " and, in the meantime, adjourn further procedure in the
 " Courts of Service, to the day next."

Feb. 17, 1806.

While this competition was going on, both the appellants
 and the respondents, in this *First Appeal*, had raised actions
 of reduction improbation against Mr. Bellenden Ker, &c. to
 annul and set aside the conveyances executed by the fourth
 Duke of Roxburghe, by which the Duke had attempted to
 defeat and destroy the standing tailzied investitures, by
 which he held the titles and estates. These actions are the
 subject of the appeal which immediately follows this.

Vide the
 Appeal in the
 Reduction.

In the competition of briefs, when the cause came back
 to the Court, on the above interlocutor, they directed it to
 be argued in memorials.

In these memorials, the appellants pleaded, That the
 clause of destination, upon which the question turned, as
 expressed in the deed of nomination and tailzie 1648, was,
 " Qlks all failzing, &c. the right of the said estate sall per-
 " tain and belong to the eldest dochter of the said umql
 " Hary Lord Ker, without division and yr aires male she
 " always mareing or being married to ane gentleman of
 " honourl and lawful descent, wha sall perform the condi-
 " tions above and under written Qlkis all failzing and yr
 " aires male to our nearest and lawful aires male qtsom-

1810.
 ———
 KER, &C.
 v.
 INNES, &C.

“ever.” Unless the respondents therefore can show, first, that under the description of “eldest daughter,” a *third* daughter is comprehended; and, secondly, that, by the term “heirs male,” the male line or heir-male general of Lady Jeane Ker is not exclusively called, the claim of Sir James Norcliffe Innes is manifestly unfounded. If they establish the first proposition, but fail in the second, Colonel Ker, as heir-male of the eldest daughter of Hary Lord Ker, will of consequence be preferable to Sir James Norcliffe Innes, as heir male of Lady Margaret the third. If they establish the first proposition, but fail in the second, it will also follow, of necessity, that Sir James Norcliffe Innes, as heir male of the body of Lady Margaret, will not be comprehended in the destination at all, and the succession will devolve on Colonel Ker, not indeed as heir male of Lady Jeane, but as heir male of Robert, Earl of Roxburghe, the entailor. The first proposition was untenable, because a single substitution, in favour of an eldest daughter, cannot consistently, either with common or technical language, be extended into four consecutive substitutions in favour of a series of daughters; and that the second proposition is untenable, because it is contrary to the fundamental principles of construction, to convert a legal phrase of fixed and definite import into another legal phrase of an import entirely different, by an arbitrary interpolation of the words which distinguish them:—That the destination, as it stands, is simple, intelligible, and practicable:—That the words of the entail ought not to be controlled by the conjectured will of the entailor, who has been a century and a half in his grave; but, nevertheless, that it may be inferred, from every reasonable source of conjecture, that he had expressed the meaning which he was desirous to convey:—That neither the structure of the clause, its relation to the context, the phraseology of the deed, nor the import of any other clause, gives the smallest countenance to that construction for which the respondents contend:—That the deed in 1644, which had been revoked and abandoned by the maker, cannot expound the posterior deed which he substituted in its room; but, if it were receivable for the purpose, that it would prove highly advantageous to the argument of the appellants:—That feudal grants *inter vivos*, and in particular, Scottish entails, admit no latitude of construction; and that this principle has been established by a numerous and unbroken series of decisions, both in the Court of Session and in the House Lords:—That

th, destinations depending on the identical terms now in
ion, have been repeatedly construed, and the appro-
e and technical meaning of these terms invariably ad-
l to, in circumstances much more favourable to the plea
tention :—And, finally, if others were indulged in that
gard of legal phraseology and license of interpolation
the respondents demand, that not an investiture in
and could be relied on, nor the title of a landed proprie-
e deemed secure.

1810.

KER, &c.
v.
INNES, &c.

e Court of Session having advised these memorials,
ounced this interlocutor :—“ The Lords having advised
mutual memorials given in by the parties in this
se, in obedience to the interlocutor of 18th day of
ruary 1806, writings produced, and having heard
nself for the parties in their own presence, they remit
he Macers, with this instruction,—that they prefer the
mant Sir James Norcliffe Innes, heir male of the body
Lady Margaret Ker, in the foresaid competition of
ves relative to the estates and honours of the family of
xburghe, and to dismiss the brieve at the instance of
gadier-General Ker; but supersede extract until the
t box-day in the ensuing vacation.”

March 6 and
10, 1807.

further reclaiming petition and answers the Lords
ounced this interlocutor :—“ The Lords having resumed
sideration of this petition, and advised the same,
h answers thereto, they of new remit to the Macers,
h this instruction,—that they prefer the heir male of
body of Lady Margaret Ker in the aforesaid competi-
i of brieves relative to the estates of the family of
xburghe, on his proving his propinquity; and, in that
nt, to dismiss the brieve at the instance of Brigadier-
ieral Ker; and, with these explanations, they refuse
desire of the petition, and adhere to the interlocutor
laimed against.”

July 7 and 8,
1807.

nions of the Judges :—

(*Interlocutor, 6th March 1807.*)

ND PRESIDENT CAMPBELL said,—“ 1st Point. The eldest
ter denotes, in my opinion, seniority; for example, eldest ma-
e, eldest judge, &c. It is not usual to say senior person, e. g.
r son or senior daughter, or senior heir portioner; but eldest
eans the same thing, and implies progression, for, upon failure
person to whom that designation applies in the first place,
xt daughter comes in her place as eldest,—and therefore a
er son or daughter may come to be the eldest. Besides, the

1810.

KER, &C.

v.

INNES, &C.

Mor. 15425.
Ante vol. ii. p.
322.

words 'without division,' and word **THEIR**, clearly implying, in the present case, not individuality in a strict sense, but a description applying successively to different persons. It is just primogeniture. It is not the *vulgaris substitutis* of the Roman law; but must have its effect at whatever time the succession opens in favour of the eldest heir portioner then existing. It is not necessary that the daughter who was generally the eldest should be now alive, for if she has left such heirs as are designed in the deed, these come in her place. If she has left none, the person who was second daughter has now become the eldest, or heir who, of course, must next take. But the great difficulty lies in the 2d Point, namely, the import of **HEIRS MALE** expressed generally. See the case of *Linplum*, and Justice Clerk's (*Braxfield*) opinion in that cause. While, on the one hand, the terms *heirs male* are generally understood to be technical, and it is difficult for a Court to construe the legal signification of words from probable intention; on the other hand, every deed ought to be construed so as to be consistent with itself, and avoid absurdity. If he meant to call only Lady Jean and her *heirs male whatsoever*, he might have stopt there.

"The second daughter could not have any other collateral heirs male except those of her sister, and these also included her own heirs male, and yet these are called in after the former are exhausted, i. e. after they themselves are exhausted. If he had meant to exclude the younger daughters when they became eldest in their order, he would have said so. He had only to call Lady Jane alone by name and not by description, and to have added some words of exclusion as to the rest. Eldest heir portioner would not have been proper, as he did not mean to call their posterity in the female line. Heirs male *whatsoever*, or heirs male general, are technical. But *heirs male* may be so or not, according to circumstances. (See case of *Linplum*). The word *their* heirs male, if taken literally, would bring in General Ker even before the son of Jane.

"Heirs male, and heirs male whatsoever, are contrasted in the same clause. The first, which is introduced by the word *their*, means the peculiar heirs male of the family. It is not a simple destination, but a complicated clause—the common words heirs male would bring them in too soon. In the case of *Linplum*, there is great reason for thinking that the phrase was properly altered, to let in the third and other younger sons of Drummelzier, and even eventually the eldest, as the only object as to the eldest son was to exclude the eldest of the Tweeddale branch. Besides, suppose one daughter only to have been here meant, must we not hold it to be the eldest at the time of the succession opening? It could not mean eldest born, for she might have predeceased him. Neither could he mean the eldest daughter at his death, for he called first the Drummonds, whose father was married to the eldest, and then the Flemings, whose father was married to a daughter of Sir William Drummond's.

We must first see what the deed does *not* mean, and then see what it does mean. The instance of an elliptical mode of expression, from Livy, in the case of the College of St. Andrew's, must be retained. There is a distinction in the English law between bequests or devises, and deeds. The latter are strictly construed ; and are never more favourably for intention. A nomination of heirs is purely testamentary. This is clearly made out in the case for Mr. Douglas, drawn by Mr. Burnet in the Douglas case. A deed, in England, is a writing or instrument in which two at least are concerned,—a grantor and a grantee,—and proportion a consideration as the cause of granting. Vide Fonblanque on Equity, p. 144. A deed imports consideration, and is for the benefit of the grantor, and if there be doubt in the words, they are construed against the grantor. Vide also Blackstone, vol. 2, p. 36. A testament is a conveyance of the personal estate, and of real estate, which, by the Statute of Wills, is allowed, but subject to certain precautions imposed by the Statute of Frauds. Testaments and devises are liberally interpreted, so as to give effect to the intention of the grantor, who alone speaks, no other party being understood to be concerned ; with attention always to certain general rules of construction, such as, that we are not to go out of the words of the deed itself : but must take the whole of it together, with this limitation only, that we are not to imply restraints upon property. A testamentary deed, which flows from will alone, does not cease to be a deed when it is changed afterwards into a feudal investiture. It is not differently construed at different times. The question, *who is concerned*, is always a question *inter familiam*, with which the public has no concern. The act 1685 has nothing to do with this, but merely relates to limitations on property : and this is the meaning of the judges' decision in the case of Duntreath. In the present case, Earl Robert was bound upon failure of the first branch of the destination in the bonds and Flemings, to carry back the succession to his daughters and their representatives in the male line, or at least to *concessu* to one granddaughter, and her male representatives of a certain description. The word *their*, and the words *without limitation*, denote plurality, and, in a question of intention, 'every word must have its sound.' But, suppose *one daughter* only to be intended. Who is she? The word *eldest* is *relative*, i. e. it must either refer to the time of birth, or the time of decease of the tailzie, or the time of succession opening to the second branch of substitutes ; with this qualification, that she and her heirs male must be taken together, so that although a daughter has failed before that time yet if she has left a representative in the male line, i. e. a son's son, &c. who were representatives, and, by the plain meaning of the deed, stands in her place, these male descendants must take what she herself would have done had she been alive. A collateral construction could never be understood as the meaning under that de-

1810.

KER, &c.

v.

INNES, &c.

1810.
 ———
 KER, &C.
 v.
 INNES, &C.

scription. He can never claim through her as his ancestor, especially if there be any substitution after him, with which such a claim would be inconsistent. The competition might have happened between the collateral heir male and Lady Ann or Lady Margaret then living.

LORD JUSTICE CLERK (HOPE).—"We must always look to the words of a deed. Writing is a reiterated speech. If a word or phrase is used capable of two meanings, we must find out which of them was meant. If it is capable only of one meaning, we must take it. Heirs male are technical words, having a precise legal sense and meaning, and therefore no question of intention, and no construction can be allowed to control these terms. There are many patents of honour taken to heirs male, but no one ever doubted who that means. As to the destination 'eldest daughter,' I think this means the eldest born, and that it would be a stretch to carry it farther. In this view, I think General Ker ought to be preferred.

LORD MEADOWBANK.—"My Lords, Having considered this case as a very doubtful one, and being fearful that, if decided according to the indications of intention afforded in the deeds, it might touch on the rules of interpretation of settlements of succession, which I have ever deemed it of the last importance to preserve sacred and inviolable, it is a very great satisfaction to me to find myself relieved from this anxious state of mind by the very able discussions which have taken place at the bar, and the opportunity they have afforded of contemplating the case at leisure in a variety of lights. One simple view of it appears now to me to admit of no reasonable doubt, and to be free of the difficulty which certainly attends the attempt of giving a full legal interpretation to the controverted clause, suited to all the events which might have happened and might have called for such an interpretation. In my humble opinion, under the events which have happened, Lady Margaret Ker is now entitled to the legal description in the controverted clause of the eldest daughter of umql Hary Lord Ker, and Sir James Norcliffe Innes is her nearest heir male, and, of consequence, the heir of the destination contained in that clause. In this opinion nothing, I think, admits of any debate, but the application to Lady Margaret of the description of eldest daughter of Hary Lord Ker; for truly I do not think it admits of debate that Lady Jane Ker ever took under the destination, and can be held to have exhausted it. Lady Jane, without doubt, was a substitute heir of entail, and Earl William Drummond's marriage with her was the condition on which he succeeded to the estate and titles; but he never succeeded to the estate, nor did any of her descendants succeed in her right, or ever serve, or have occasion to serve, heir to her. I think it therefore utterly impossible for any lawyer to conceive that the destination to the eldest daughter has ever taken place in the person of Lady Jane Ker, or her descendants; and, accordingly, General Ker claims to serve, not to Lady Jane herself, or any of her

descendants, but only through her as her collateral heir male, under the controverted destination to the eldest daughter. Holding it then clear that the failure of the male descendants of Earl William Drummond by Lady Jane now opens the succession to a different destination from that in which the estate, since the death of Earl Robert, has been enjoyed, the only question for your Lordships' determination at present, in my opinion, is, Whether the controverted clause in question ought to carry the succession to General Ker, as collateral heir male of Lady Jane Ker, under the description of eldest daughter of umql Harry Lord Ker, without division, and 'their heirs male?' or whether this same description does not now belong to Lady Margaret Ker, and, of course, confer the succession on her undoubted heir male, Sir James Norcliffe Innes?

"It will be remarked, in trying this question, that the cases of *Tennant v. Tennant*, *Baillie*, and *Limplum*, may be laid quite out of consideration. The term *heirs male* here is interpreted the same way by both parties, and it is equally unquestionable that General Ker is heir male of Lady Jane, and that Sir James Norcliffe Innes is heir male of Lady Margaret. The only point, in this view of the case, at issue is, who is the eldest daughter of Harry Lord Ker, now that the succession, by the failure of the Drummonds and Flemings, has opened to Harry Lord Ker's eldest daughter?

"It will also be observed, that the controverted clause says nothing of the eldest daughter favoured marrying a gentleman of the house of Ker. All that is there conditioned in this way, is the marrying a gentleman of honourable and lawful descent, which there can be no doubt Lady Margaret fulfilled in marrying into the very ancient family of Innes. Nothing therefore need be said on this qualification.

"Returning thus to what is plainly the only debateable question, under this state of the case, to whom does the description of eldest daughter of umql Harry Lord Ker now apply? I observe, in the first place, that here there is no room for any attempt to stir a doubt whether your Lordships are to read the clause as it stands in the deed 1648 or charter 1650, for in the disposition 1747, granted for the purpose of forming the late Duke John's title to the estate, and which formed it accordingly, on which prescription followed, the destination in the controverted clause is expressed in the same terms precisely as in the deed 1648, except using the term *her* heirs male, instead of *their* heirs male, a circumstance which I consider as of mighty little consequence, especially as regards the question I am to examine. At the sametime, I think it right to state it as my clear and decided opinion, that the deed 1648, and the language there used, form the legitimate subject of your Lordships' construction in deciding between these parties. That deed is expressly referred to in the deed 1747, and in previous deeds of a similar nature, for the very purpose of maintaining its des-

1810.

KER, &c.

INNES, &c.

14941.
House of
Lords, ante
vol. ii. p.
243.

1810.
 KFR, &c.
 v.
 INNES, &c.

tinations and provisions in force, and of holding them up as the *regula regulans* of the succession. And as I conceive it to be settled law, that a destination of succession may be competently referred to in the investiture, as contained in a separate document, and by such reference will be equally effectual as if it were specially set forth in the investiture, I have not a shadow of doubt that your Lordships are equally at liberty to give effect to what you reckon to be the true import of the deed 1648, as your predecessors would have been had the question occurred within the forty years' prescription at the date of that deed. Clauses of destination contain no real right at common law, nor form burdens on estates.

"I hold, secondly, that your Lordships are bound to construe the terms eldest daughter, in the controverted clause, according to what you reckon was the true intent and meaning of Earl Robert in employing it. 'Eldest daughter' is not, like heir male, a technical term; it is a term of common and vulgar use, and is always employed and construed in settlements as relative to some circumstance, eldest at the date of the settlement—eldest at the death of the testator—eldest when the destination opens—eldest relatively to, or eldest absolutely in point of birth. She, as the Jews, to prevent ambiguity, expressed it, 'was the first that opened the womb.' In the clause which soon follows the controverted one, where Earl Robert means to provide for his granddaughters, he says, 'and gif they be all three in life, to content and pay to the eldest the sum of 50,000 merks, to the second the sum of 30,000 merks, and to the youngest the sum of 30,000 merks.' It is plain, from the words *all three* here used, that the clause proceeded on the preconception that one of the four ladies would certainly enjoy the estate as wife of the heir, and that therefore three were all that there would be to provide for. And utterly uncertain as the Earl was which of the three would be in this situation, he describes one of them as the eldest, and gives her 20,000 more than the others, in consequence of that title, without regard to whether she should chance to be Lady Jane Ker or Lady Anne; and I suppose, that as the fact happened, Lady Anne, who I believe was Countess of Wigton, enjoyed under this description of eldest daughter this bonus of 20,000 merks above her sister, while Lady Jane, the first born, was alive and bearing children. Again, in the deed 1644, after naming the Flemings to be his heirs, the Earl conditions, 'They always marrying and taking to them lawful spouses, the eldest lawful daughter of the said Lord Ker, our son, being in life and unmarried at the time.' Here the eldest lawful daughter may plainly import either the first born or the youngest, or even the youngest, according to circumstances.

"Considering, therefore, eldest daughter as an ordinary term of common use, I apprehend we have nothing to do with all the discussion about strict and liberal interpretation to be applied to settlements. My own opinion on the point is very clear,—that in the

construction of destinations in settlements, the will of the testator, if proved, must be the rule :—that the proof must be precise, if the intent is to control technical words, and give them a sense different from their proper one. But, where the words used are not technical, and admit of different meanings, I cannot doubt that the more probable and rational one ought to be adopted in preference even to one more primary and direct, and that this must obtain with particular force in the construction of settlements where the testator had no person to bargain with, so as to call attention to every word, and where we have no resource but to judge of intention from the contents, and all the circumstances of real evidence that the case affords.

“ But several cases may be supposed :—1st Case. Suppose Lady Jane had predeceased the Earl without issue, and that the Drummonds and Flemings were all gone, Would eldest daughter have applied to her? Could it have been maintained that Ker of Fawdon-side would have served through her as heir of tailzie and of provision, while Lady Ann, Margaret, and Sophia were alive?

“ It is said he knew what ‘ eldest daughter’ signified,—that it signified the first born; but, did he know it always? Why, rather, did he not use the terms ‘ Lady Jane’ at once, if he meant so?

“ 2d. Suppose Lady Jane survived her father, but died without issue male, and was followed by her husband after the Earl’s death, and that the Flemings had failed, Could there be any doubt more than in the former case, that the destination opened to the eldest daughter of Lord Ker then actually in existence?

“ It must have been perceived that it was impossible the collateral heir male could plead on any rational intention to support a claim in right of Lady Jane, in prejudice of the person then the eldest daughter when this controverted clause was to take effect. Nothing could have been more absurd than, when he expressly intended to prefer his eldest granddaughter, to have introduced collateral heirs male in preference.”

LORD ARMADALE said,—“ I think there is no prescription run against the deeds, particularly under the deed 1648, because the subsequent charter 1747, refers in *terminus* to the destination 1648. I admit the rule of interpretation as to *voluntas testatores* in the construction of a destination; but I observe that the deed 1644 is only superseded, not revoked *per expressum*, and therefore it is a fair ground of interpretation to look back to it. I agree with Lord Meadowbank, that there is no indication in the rest of the deed 1648, as unfavourable to the younger granddaughters. Nor are you to consider taxative the terms, “ eldest daughter.” Suppose Sir William Drummond and his heirs male, and all the Flemings dead, and Lady Jane herself before her father, would your Lordships not have held Lady Anne eldest daughter? or would you have preferred the heir male in general of Lady Jane? I also lay stress on the

1810.

KER, &c.

v.

INNES, &c.

His opinion how deeds fall to be construed.

1810.
 KER, &c.
 v.
 INNES, &c.

words, "*without division*." I think the construction of technical terms, "heirs-male," more difficult. But I also confess, that there are a variety of circumstances, and a few seem to me decisive in favour of the limitation. 1. The deed was executed at a period when the terms were used in substitutions in tailzies, viz. "Heirs-male" denoted heirs-male of the body. So thought Craig and Stair. So it is recognized in the statute 1685; and the decisions of the Court in the case of *Tennant v. Baillie*. The case of *Linplum* was only decided in 1748. Of course, you interpreted *Linplum* by present language, not by the language of the 17th century. But, secondly, the clause of *acquirenda* is decisive. I rest my opinion on these two points; but there are other points also of considerable importance, viz. 1. The eldest daughter marrying a gentleman of honourable descent, which is a strong expression to indicate that the destination was not confined to one only. 2. The absurd consequence of calling the heirs male whatsoever of Robert, before the descendants of the younger. I am satisfied, from the deed 1648, that the ladies were viewed in the same light, and to take *suo ordine*. In the cases of *Linplum* and *Tennant*, the question was a mere abstract question for decision, where there was nothing to infer the deceased's intention. I agree with Lord Meadowbank otherwise."

LORD NEWTON.—"I am of the Lord Justice Clerk's opinion, and for giving greatest weight to technical words. A judge would take a heavy responsibility on him if he interpreted them against the true meaning perhaps of the testator, which I hope I shall never hear done. (Quotes a passage where Lady Jane is described as eldest daughter). It is clear, therefore, that the terms in the clause of destination must signify Lady Jane. 2. I think, as to the term heirs male, both from the deed 1644, and even from a clause in this very deed 1648, that Earl Robert knew perfectly well the import of heirs-male of the body, and uses it when he meant it. But here, in the deed 1648, he has not used it; and, therefore, I suppose he did not mean it. But the deed 1644 removes all difficulty, if that deed can have any effect on the question; for there the destination is more favourable to Sir James Norcliffe Innes."

LORD HERMAND.—"I am for preferring Innes."

LORD GLENLEE.—"I am for preferring Innes. The rule of interpretation is not to take destinations and remote analogies, but in settlements we must take some latitude of interpretation, and General Ker needs most latitude; for it is by going back to the deed 1648 that he infers eldest daughter is a nominatim designation of Lady Jane. But you must take not partial technical meanings, but take the whole clause as it stands. Words become technical by the operation of them, or the use of them, and their meaning thus become fixed. For example, you might repeat decisions in a case exactly like it, but a slight alteration from these technical words, as for instance, calling the heir-male claiming, after the heir-

male, with whom the contest occurred, would alter the case. I am therefore of opinion that the eldest daughter at the moment of the succession opening was here meant. There is a marked opposition between heirs male of the Earl, and the heirs male of the daughter."

1810.
KER, &c.
v.
INNES, &c.

Advising, 7th July 1807.

LORD MEADOWBANK said,—“ In considering the clause, the first point to settle is, Whether it requires construction ?

“ It calls as substitutes the eldest daughter of Lord Hary Ker without division, and without other mention of her sisters than is implied in this expression, “ without division.” It calls in the plural number, *their heirs male*, under the proviso of marrying a gentleman of lawful and honourable descent, who shall perform the conditions of the entail, and then calls certain parties, and which all failing, and their said heirs-male, our nearest heirs-male whatsoever.

“ The first point is, What does eldest daughters mean ? It is said to be equivalent to calling Lady Jane Ker by name ; but had she been called as an individual, would ever any person have thought of adding the words, *without division* ? Whom was she to divide with ? But if without preference to one above another, further than mere seniority, as it happened, when the succession under this branch of the destination opened, the words, without division, seems a proper and natural addition.

“ Second, Then what is the antecedent to ‘ *their* ?’ General Ker at first said, that the gentleman of lawful and honourable descent that she was to marry was meant, and the heirs of her and the gentleman. But general Ker now says, that this word is a mere blunder, but I am not to suppose a blunder necessarily, or even if there is a grammatical blunder, am I entitled to deny a meaning to it, if I can find one ? And the words *their* is essential to the interpretation of heirs male. I must know *whose heirs male* are preferred before I can say who the heirs male called are. *Third*, Which all failing, ‘ *and their said heirs male*.’ Now, who are these *all*, and what are the *said heirs male* ? Are they the heirs male of the bodies, or the heirs male general of the *all* ?

Second Point. What is the true construction ? The rules of construction have always been against conjectural construction. A person must not only have the power and the intention, but must express his intention, to entitle a court of justice to give effect to his purposes. But the expressions of intention are sometimes very obscure ; and, therefore, I hold it fair to seek for any unsuspected source of discovering their true meaning, and to judge with such aids. Expressions, otherwise obscure, become often in this way quite clear, and apparently pregnant with meaning. Hence, we inquire after the circumstances of a man’s family and situation, when we have such passages to construe in his will ; and shall we refuse to look into

1810.
 ———
 KER, &C.
 v.
 INNES, &C.

former settlements, where we may discover the views he had been in the habit of entertaining and cherishing in this very matter of settlements. The sources of construction, in this view, are, in this case, 1. A corresponding clause in a deed 1644. 2 A general correspondence between the deeds 1644 and 1648, and the latter deed generally more favourable to his granddaughters than 1644, particularly in the disability of the Drummonds and Flemings succeeding to transmit the succession to children by any other wife than the ladies, unless they decline the honour.

“ But still we are not at liberty to hold that clause transfused into the deed 1648. I have got probably the key to the riddle, but still I must see whether the riddle be so constructed as that it answers the key.

“ 1. I can have no doubt that it sufficiently denotes the eldest at the time of the succession opening to the substitution. This is the ordinary construction in all such cases. It is favoured by the whole conception of the deeds. The daughters of Hary Lord Ker were to be offered marriage, according to seniority—portions to any three, not the countess, and the eldest of them has her two-fifths more.—Without division, alludes to a calling of other sisters; and whether or not this and other words in the clause shall be held to amount to an actual calling of them; still they plainly infer the calling of one of a number, not an abstract individual, and, of consequence, the eldest at the time.

“ 2. I am clear that the heirs male of the body is the import of the term used in this destination to eldest daughter.

“ The first key to the riddle admitted that import, and there is no reason to suppose any change of mind, but every reason to the contrary.

“ The second riddle itself, *i. e.* The doubtful clause, if narrowly examined, admits of that construction better than any other. 1. *Their heirs male, i. e.* as General Ker first alleged—‘ *Eldest daughter and her husband* (and rightly, according to the correct principles of construction), their heirs male, viz. the heirs male of both, and who are these, but heirs of the marriage only. 2. The *marrying* applies only to heirs as a condition precedent, as Mr. Cranstoun terms it, not to eldest daughter. Could it ever bar a child’s service, or an aged lady’s service, that she was not married? But if it applied only to heirs, What heirs could it rationally apply to? Certainly only to the production of an honourable *union*, not to heirs male general, nowise countenanced by the circumstance:—as, for example, the heirs male of a disgraceful *union*. 3. And what I hold conclusive (and taking this case as clearly one out of the case of Linplum), is the clause of general appointment.”

LORD ARMADALE.—“ I am clear, that by the general law, a destination to ‘eldest daughter,’ means the eldest daughter alive when the succession opens. ‘*Heirs male*’ here mean heirs male of the marriage, viz. by her husband, of lawful and honourable descent.

The clause of *acquirenda* supports this opinion ; and in this no contrary intention is expressed."

LORD GLENLEE—" I remain of my former opinion."

LORD PRESIDENT CAMPBELL—" I remain also of my former opinion."

LORD JUSTICE CLERK (HOPE).—" There is a doubt even as to intention, for when the Earl executes a deed in 1644, to his four daughters by name, and afterwards, by another deed in 1648, alters this destination, and conveys to the eldest daughter only, the intention cannot be very clear in favour of Sir James Norcliffe Innes. Besides, if intention is to rule, it must be an intention appearing within the four corners of the deed 1648 : for to read that deed by the intention discoverable from a previous deed, would be incompetent. So that, on all hands, the intention being doubtful, I think this binds us imperatively to follow the technical words."

LORD WOODHOUSELEE.—" Sir James Norcliffe Innes must make out that a destination to a man and his *heirs-male*, means heirs-male of his body *alone*."

The Court, at this advising, was divided as formerly.

STATE OF VOTE.

For Sir James Norcliffe Innes.

LORD PRESIDENT CAMPBELL.
LORD POLKEMMET.
LORD CULLEN.
LORD ARMADALE.
LORD BANNATYNE.
LORD BALMUTO.
LORD HERMAND.
LORD DUNSINNAN.
LORD CRAIG.
LORD GLENLEE.
LORD MEADOWBANK.

For General Ker.

LORD JUSTICE CLERK.
LORD WOODHOUSELEE.
LORD ROBERTSON.
LORD NEWTON.

From these interlocutors, in which these opinions were given, the appellants brought the present appeal to the House of Lords ; and the respondents also, in conjunction with the appellants, brought a cross appeal as to the previous interlocutors of the Court of Macers, and the Court allowing Mr. Bellenden Ker and Mr. Gawlor, and John Seton Karr, to appear in the competition for their interests.

Pleaded for the Appellants.—The appellants maintained the following propositions at great length :—1. In the limitations of a Scottish tailzie, the term " eldest daughter," in its usual and appropriate sense, is the description of an individual, and not a collective signifying a series of daugh-

1810.

KER, &c.

INNES, &c.

Vide next
Appeal.

1810.
 ———
 KER, &c.
 v.
 INNES, &c.

ters; therefore a substitution, conceived in favour of the eldest daughter of Hary Lord Ker, did not comprehend his *third* daughter. 2. The term "heirs male," in the law of Scotland, invariably extends to heirs male in general; therefore, under the second clause of destination in the tailzie of Roxburghe, the heir male in general of the eldest daughter of Hary Lord Ker, is preferable to the heir male of the body of his third daughter. 3. If the limitations of a tailzie are intelligible and practicable according to the usual and technical import of the words in which they are expressed, they ought not to be controlled by a reference to the presumed intention of the entailer; therefore presumptions with regard to the Earl of Roxburghe's intention ought not to be allowed as a ground for extending a substitution in favour of his eldest granddaughter into a substitution in favour of his four granddaughters, or for contracting a substitution in favour of heirs male into a substitution in favour of heirs male of the body. 4. The presumptive evidence with regard to the entailer's will, upon which the respondents rely, is as inconclusive as it is incompetent; and there is reasonable ground to infer, from every source of probable conjecture, that the words he employed, taken in their common acceptation, express the meaning which he wished to convey. 5. No inference arises either from the structure of the clause in question, its relation to the context, the import of other clauses, or the peculiar phraseology of the entail, in favour of that interpretation which the respondents propose; on the contrary, they all tend to show that the terms "eldest daughter," and "heirs male," are employed in their usual and appropriate acceptation. 6. The clause to be construed does not import a destination singly to whichever daughter, or whichever male line descending of the daughters of Lord Hary Ker happened to be eldest when a right opened under it, or in the words of the respondents, to the eldest *debito tempore*; and although that construction were to be adopted, it would not avail the plea of Sir James Norcliffe Innes. 7. The Earl of Roxburghe's deed of nomination in 1644, virtually revoked by the charter in 1646, and by the subsequent deed 1648, ought not to be admitted as evidence of the entailer's intention, for the purpose of controlling or explaining the latter deed. 8. If the deed of nomination in 1644 were admissible evidence of the Earl of Roxburghe's intention in 1648, and as such might be used in expounding his entail, it would redargue the construction for which the respond-

ents contended, and serve to show that the terms "eldest daughter" and "heir male," in the clause in question, are meant to be taken in their ordinary and appropriate sense. 9. Other documents which have been resorted to, as explanatory of the clause in question, support the construction for which the appellants contend. 10. By the law of Scotland deeds are more strictly construed than wills; of deeds those connected with the investitures of land are more strictly construed than others; tailzied investitures are the most strictly construed of all; yet the respondents have applied a latitude of construction to the tailzie of Roxburghe utterly inadmissible, even in the case of a will. 11. The principles of construction on which the appellants rely, have been established by a numerous train of decisions in the Court of Session and in this Honourable House. In every case which has occurred tailzies have been strictly interpreted, the express destination of the entailer has been carried into effect, if intelligible and practicable, and the legal import of the terms "heirs" and "heirs male" has been scrupulously adhered to, in opposition to presumptions much more conclusive than the respondents can urge, that they were meant to be confined to descendants. Here the appellants referred to the following cases: Duke of Hamilton *v.* Selkirk, 3d April 1740; Scotts *v.* Carfrae, 13th Dec. 1769, Hailes' MSS. Notes; Bailie *v.* Tennant, 17th June 1766, House of Lords, 26th March 1770; Hay *v.* Marquis of Tweeddale, 20th June 1771 and 19th Feb. 1772, Fac. Coll. House of Lords, 23d April 1773; Hay *v.* Hay, 25th Nov. 1788, Mor. 2315, House of Lords, 7th April 1789; Campbell *v.* Campbell, 28th Nov. 1770, Fac. Coll.; Coutts *or p.* Descury *v.* Ball, 6th March 1806. 12. The rights of the parties in this competition must be regulated by the subsisting investiture, and not by the tailzie in 1648; therefore the respondents are not entitled to plead on any expression in the former which was altered in the latter. *Second Appeal.* John Bellenden Ker, Henry Gawler, and John Seton Karr, having been allowed to appear, pleaded that neither Sir James Norcliffe Innes nor Brigadier-General Ker were entitled to be served, because the late Duke of Roxburghe was the last substitute under the entail, and being, of consequence, an unlimited proprietor, had effectually conveyed the estate to his trustees and disponees. Consequently, in the cross appeal, the appellants concur with Sir James Norcliffe Innes in contending that John Bellenden Ker and Mr.

1810.

KER, &c.

v.

INNES, &c.

Ante vol. i. p. 271.

Ante vol. ii. p. 243.

Ante vol. ii. p. 322.

Ante vol. iii. p. 142.

1810.

Gawler, and John Seton Karr have no interest to appear in this competition of briefs.

KER, &c.

v.
INNES, &c.

Pleaded for the Respondent, Sir James Norcliffe Innes.—

1. In consequence of the death of William, Duke of Roxburgh, who was the last male descendant of the marriage between Sir William Drummond and Lady Jean Ker, the issue male of Lady Anna Ker, and of the persons in succession designated for her husband, having also failed, the right of succession has devolved upon the respondent, Sir James Innes Ker, the great-grandson, and lineal male descendant in the direct line of the marriage between Lady Margaret Ker and Sir James Innes, under the following clauses contained in the deed of nomination of 1648, "and qlkis a failzeing be deceis, &c. the richt of the said estait sall p^{er} teine and belong to the eldest dochter of the said umq^l Hary Lord Ker, without divisioone and yr aires maill she alwayes mareing or being married to ane gentleman of honnol and lawful descent wha sall performe the conditiones above and underwrn Qlks all failzeing and yr sds aires maill to our narrest and lawful aires maill qtsuⁿ ever :"— " And Quhilkis personnes successivè designit be us in manner foresaid and under the provisiounes restrictiones and conditiones above written and no other wise we by thir pnts design nominate and appoint to succeed to us as aires of tailzie in our hail lands and baronies erledom and others above written, contained in the said pröries and infestments and in all utheris lands and heritages pertaining to us (failzeing of airis maill lawfully gotten or to be gottin of our awin body as said is) and sall be servit retourit entirit and infest thereintil as airis to us sicklike and in the samen manner as giff they were specially and particularly insert in the saides pröries and infestments following or to follow thereon and ordains that the samen conditiones provisiounes and restrictiones abovewrn sall be ather particularly or generally expressed and set down in the service and retour and infestment to follow thereupon in favour of the saidis airis of tailzie *respective* and in cause we will be exprest and set down thereintil nather generally nor particularly in that caise we will and grant and be this pnts expressly declare that the samen provisiounes restrictiones and conditiones above specified sall be as effectual as giff they were specially exprest and set down thereintil." 2. It is unnecessary to resort to construction, in order to interpret the true mean-

ing of this clause of destination under which Sir James Innes Ker claims, it is, according to the soundest principles of law, indispensably requisite that the whole words shall be taken together, and the fair sense and meaning of all of them allowed to have full effect; that words are not to be taken separately from others with which they stand necessarily connected; that where the intention of the granter of the deed is fairly discoverable it ought to rule the words, and that the words ought not to rule the intention; that the intention may properly be collected not only from the whole clause itself, but from the rest of the deed in which it occurs, as well as from *any other deed* executed by the same person, with reference to the same subject, *which has not been expressly* cancelled or revoked; and, lastly, that a sound, rational, and probable meaning be put upon the whole instrument.

1810.

KER, &c.
v.
INNES, &c.

In conformity with these principles, the respondents, with all deference, insist that, by the destination in question, the right of succession to the estate of Roxburghe is provided, on failure of the prior substitutes, not to the individual eldest *born* daughter of Hary Lord Ker, and her heirs male general, but to each of the daughters of his Lordship *seriatim*, and the heirs male of their respective bodies, in their order.

The appellants maintain, in support of an opposite construction of this clause, that the words "eldest daughter" and "heirs male," are of so fixed and determinate a meaning, as to be equivalent to a destination only in favour of Lady Jean Ker, the eldest *born* daughter of Hary Lord Ker *nominatim*, and her heirs male general, to the total exclusion of her younger sisters, and the heirs male of their bodies. The respondents, upon the contrary, contend that the words "eldest daughter" and "heirs male," even taken by themselves, are not of the precise and definite import represented; but even if they were much more so than they truly are, they are not to be taken merely by themselves, but must be viewed and explained by other words of the clause with which they obviously stand united. It is submitted, that the words, "to the eldest daughter of the said unql Hary Lord Ker, *without division*, and *their* heirs male, she always marrying," &c. so far from necessarily designating, in the language of the law of Scotland, *the eldest born daughter* of his Lordship, and her heirs male general, to the exclusion of her younger sisters, and their issue

1810.

KER, &c.

v.

INNES, &c.

male, do plainly import a destination in favour of the whole daughters of Hary Lord Ker successively, and the heirs male of their respective bodies, the eldest for the time, or her issue male, having right to succeed without division.

3. The term "eldest," when applied either to a son or a daughter, does not necessarily denote individuality, but is generally used collectively, to designate one of a class or series, and becomes, in the progress of time, applicable to a variety of individuals in their order. Thus, according to the established principles of the law of Scotland, an estate destined to the "eldest son" of A, in the event of the death of the eldest born son, descends to the eldest living at the time when the destination opens. And, in this sense, the term is evidently used in a variety of passages of the very deed now under consideration. Nothing can, indeed, more clearly demonstrate the absurdity of a contrary interpretation than the circumstance, that if Hary Lord Ker had had a daughter born elder than Lady Jean, she as well as all her younger sisters, must, on the appellant's hypothesis, have been completely excluded from all right to their grandfather's succession under the clause of destination in question. Upon this point a very familiar authority may be borrowed from the law of England, for, according to it, though the Duchy of Cornwall is declared to pertain to the King's *eldest son*, yet, upon the death of the *first-born*, it has been decided that the duchy descends to the *eldest then living*. Lord Hardwicke, in *Lomax v. Holmden*, observed, Vesey, p. 294. "That the eldest son of the King of England takes the "Duchy of Cornwall as *primogenitus*; although Lord "Coke, at the end of the Prince's case, says otherwise. "But this was not the point there, being only an obser- "vation of his own, and has ever since been held a mis- "take of that great man. He was mistaken in the fact, "in saying Henry the VIII. was not Duke of Cornwall, "because not *primogenitus*; for Lord Bacon, in his His- "tory of Henry the VII., affirms the contrary, that the "Dukedom devolved to him on the death of Arthur, and "this is by a great lawyer, and who must have looked into "it, as he was then Attorney or Solicitor-General." Mr. Christian, in his notes on Blackstone, adds these words to the above authority of Lord Hardwicke: "But this point was "solemnly determined in 1613, upon the death of Prince "Henry, the eldest son of James I., in the case of the Duchy "of Cornwall, the report of which is inserted at length in

Blackstone,
p. 224.

“ Collins’ Proceedings on Baronies, p. 148, in which it was resolved, that Prince Charles, the King’s *second* son, was Duke of Cornwall by inheritance.” 4. But in the clause under consideration, the words “ eldest daughter” are by no means left unexplained, but are coupled with other words, which preclude all doubt with regard to the true sense in which they are used by the entailer. They stand thus: “ To the eldest dochter of the said umqll Hary Lord Ker, *without divisioune* and *yr aires maill*.” Here then eldest daughter is called, with the important addition of the words “ without divisioune,” followed by those, of “ *yr aires maill, she always mareying*,” &c. Now it is a principle firmly fixed in the language of Scotch conveyancing, both ancient and modern, that when several daughters, or heirs female, are intended to take an estate in their order, or successively, the words “ without division,” are uniformly added, it being an established maxim in the law of Scotland, that when a real estate descends to females, in the same degree, they succeed to it in equal shares as heirs portioners. In order therefore to show that he unequivocally intended his four granddaughters to take the succession in their order, and to exclude all succession of heirs portioners, the Earl of Roxburghe used the words “ without division,” as the proper and technical expression of the law. The brief expressions thus adopted by the entailer were evidently used to convey the same meaning he had previously declared, at greater length, in the deed 1644, in which, instead of applying the words “ without division” to the “ eldest daughter” of his son, he designed “ the sds Lady Jean, Margaret, Anna, and Sophia Kers, our oyes, and failing of the first, the next immediate eldest, of the said daughters, successive after oys, and their airis male lawfullie to be gottin of their bodies to be the persoune wha sall succeed,” &c.

1810.

KER, &c.
v.
INNES, &c.

If any farther evidence was necessary to prove that Lord Roxburghe had not the most distant intention to limit his succession to his eldest born grand daughter, it is to be found in the subsequent words, “ *Yr aires maill*,” and “ *Qlks all failzing, and yr saids airis maill*,” which are of themselves utterly exclusive of the idea of one individual only being called. Had Lady Jean Ker alone been intended to succeed, with her heirs male general, it is impossible that the plural “ *their*” would have been twice repeated; or that the word “ *all*” could have been used in reference to the

1810.
 KER, &c.
 v.
 INNES, &c.

failure of a single individual. As the whole of this branch of their destination is introduced by the words, "*Qlks all failing*," in obvious reference to Sir William Drummond and the other substitutes previously designed, the repetition of similar phraseology in the concluding part of the clause, can only be considered as referable to a destination in favour of a plurality, viz. the four daughters of Hary, Lord Ker, according to their order of seniority.

There are, however, other passages in the deed 1648 which demonstrate the Earl of Roxburghe's intention, in using the words of the destination in question, to have been, not to call the eldest only, but the whole of his granddaughters, in their order. Thus, with regard to the obligation to take the name and arms, the words used are, in case of failure, or that they refuse or forbear to take upon them the said surname, &c. "In that caise, the persone failzein, and the aires of their body sall amit and tyne," &c.

In like manner, in the obligation for provisions to remanent daughters, these words are used:—"In case it sall happen the said William Drummond, or any utheris, our aires of tailzie, specially or generally before mentionate, or ony of them, to succeed to the said estate and living, by virtue of thir pnts, that then and in that case, the samen persone sua succeeding, and *yr (their)* spouses to be joined in marriage with *them*, &c. sall pay," &c. From these instances, it is manifest that the expressions used are clearly not applicable to one individual only, but to any number as the case might happen.

The words adopted in this clause, which are in themselves perfectly proper, for the purpose of calling the whole daughters of Lord Ker in their order, are, in fact, sanctioned by the highest authority in the law of Scotland. Lord Stair, in treating of tailzies, says, "Some also tailzied their lands, so as by infeftment to establish a primogeniture among females, as the law has done among males; as if the land was granted to the fiar and the heirs male of his body, which failing, 'to the eldest heir female without division, and their heirs, carrying the arms and name of the family.'" Now, it cannot be supposed that, in using these words, Lord Stair had conceived that such a destination would be confined to one individual only, as he has distinctly stated, that a primogeniture *among females* was thereby introduced; and it is a certain fact, that many entails have

been constructed in the very terms prescribed by his Lordship. 5. The words, "aires mail," which the appellants maintain can only mean heirs male general, when occurring in a deed like the present, are capable of being limited and explained by the other words with which they are accompanied, and if this be conceded, then there is an end to the appellant's case. 6. Besides, from the whole tenor of the deed 1648, it is evident that the granter's intention was to call for his four grand-daughters, and their issue male, in their order, and not Lady Jean Ker, his eldest grand-daughter individually, and her heirs male general. He undeniably entertained the strongest predilection and partiality for the whole of his four grand-daughters, by his son, Lord Hary Ker, as evinced by the anxiety with which he provides for their marriages with the persons first called to his succession, all of whom are required, as the condition of their inheritance, to marry the *second*, *third*, and *fourth* in their order, on failure of the eldest, or her declining to comply with the conditions of the entail. 7. Yet it is not the deed 1648 alone that the will and intention of the Earl of Roxburghe, with regard to his succession, may be considered to be evinced;—the surrenders of the estates and honours in 1643, and charter 1646, indicate the same fixed purpose, as well as the deed of nomination and tailzie 1644. If any part of the deed 1648 can be said to be left in doubt, the former deeds may therefore be resorted to as affording additional means for ascertaining the true intention of the granter. By the nomination of the deed 1644, there can be no doubt that the whole four daughters of Hary, Lord Ker, and the heirs male of their bodies, were, on the failure of the first branch, distinctly called to the succession; and on their failure only, the granter's heirs male whatsoever were appointed to take; and in the deed 1648, the very same provision is made, though in a less amplified form. 8. The decisions founded on by the appellants establish no principle that can be considered adverse to the judgment of the Court below in the present case. (Here the several cases were gone into to show that they did not apply).

On the Cross Appeal.—In regard to the admission of John Bellenden Ker, Henry Gawler, and John Seton Karr, to be heard as parties in this competition, the respondents beg leave to reserve to themselves competent arguments on this matter. Perhaps by arrangements, as to the hearing of the different appeals in dependence, it may be unnecessary to enter in any discussion as to this. If the inter-

1810.

KER, &c.
v.
INNES, &c.

1810. locutors appealed from by John Bellenden Ker, Henry Gaw-
 —————
 KER, &c. ler, and John Seton Karr, as to the existence of the entail,
 v. are previously disposed of, as they stand first in order, all
 INNES, &c. discussion on this matter may be unnecessary.*

For Appellant, General Ker,—*Fra. Hargrave, Henry
 Erskine, Ad. Gillies, Geo. Cranstoun, Thos. Thomson.*

For Respondent, Sir James Norcliffe Innes,—*David Boyle,
 Sir Samuel Romilly, Ad. Rolland, Robert Craigie,
 Arch. Cullen, William Horne.*

For Respondents, Mr. Bellenden Ker and Others,—*John
 Clerk, James Moncreiffe.*

(Cross Appeal.)

GENERAL KER and RICHARD HOTCHKIS, W. S. *Appellants* ;
 SIR JAMES INNES KER, Bart., and JAMES } *Respondents.*
 HORNE, W. S.

(*Et e contra.*)

Case of Sir James Innes Ker, Bart., and his Commissioner,
 Respondents in the Original ; and the Appellants in the
 Cross Appeal.

House of Lords, (ut supra.)

For this case, which has been stated in the original ap-
 peal, see first appeal, with the argument there main-
 tained for Sir James Innes Ker, which is substantially the
 reasons of appeal set forth in that case for him. He further
 showed, that when the heirs of Lady Jean Ker, procreated
 of her marriage with Sir William Drummond, became ex-
 tinct, which was the case by the death of the last Duke of
 Roxburghe, and since her sister, Lady Anna Ker, married
 to Lord Fleming, and their heirs male called by the entail
 1648, in the second place, had also now become extinct, he,
 by the construction of the entail, was called to succeed as
 the heir male and great-grandson of Lady Margaret, the
 third daughter.

*David Boyle, Sir Samuel Romilly, Ad. Rolland, Robt.
 Craigie, Archd. Cullen, W. Horne.*

* The judgment will be found after the Speeches in the House of
 Lords at the end of the three Appeals.

(Second Appeal and Cross Appeal.)

1810.

BRIGADIER-GENERAL WALTER KER, and } *Appellants;*
RICHARD HOTCHKIS, .

KER, &c.
v.
INNES, &c.

JOHN BELLENDEN KER, HENRY GAWLER,
and JOHN SETON KARR, }
Also } *Respondents.*
SIR JAMES NORCLIFFE INNES, Bart., and
JAMES HORNE, .

In so far as it allows Bellenden Ker to appear in the
Competition of Brieves, and in so far as it prefers Sir
James Norcliffe Innes in that competition.

And Appeal for

JOHN BELLENDEN KER, and HENRY GAWLER, } *Appellants;*
and JOHN SETON KARR, Esqs. }

Against preferring in that Competition.

SIR JAMES NORCLIFFE INNES, Bart., and } *Respondents.*
JAMES HORNE, and GENERAL WALTER }
KER, and RICHARD HOTCHKIS, . }

Case of John Bellenden Ker, Esq.; and also of Henry
Gawler and John Seton Karr, Esqs., Trustees of Wm.
late Duke of Roxburgh, (In Competition of Brieves).

House of Lords, 15th, 16th, and 19th June 1809, and 20th
June 1810.

As has already been seen from the preceding appeal, the
Court allowed John Bellenden Ker, and the Duke of Rox-
burghe's trustees, to appear for their interest "in the services Feb. 14, 1806.
" of Brigadier-General Ker and Sir James Norcliffe Innes,
" Bart., and to be heard for their interest; and, *secundo*,
" That the points of law with respect to the construction of
" the tailzie and settlement of the estates of Roxburghe,
" must, in the first place, be determined, and, for that pur-
" pose, recommend to the Macers to hear counsel for the
" parties, and to proceed otherwise in the cause as to them
" shall seem proper."

In consequence of this remit to the Macers, they pro-
nounced this interlocutor: " Having considered what has Feb. 17, 1806.

1810
 KER, &C.
 v.
 INNES, &C.

“ been respectively stated by the counsel for the parties,
 “ and advised with the Lords Assessors, they, in terms of
 “ the foresaid interlocutor of the Lords of Council and
 “ Session, find, *Primo*, That Messrs. Bellenden Ker, Henry
 “ Gawler, and John Seton Karr, have a title to appear in
 “ these services, and to be heard for their interest; and,
 “ *Secundo*, That the points of law, with respect to the con-
 “ struction of the tailzie and settlements of the estate of
 “ Roxburghe, must, in the first place, be determined; and,
 “ in order thereto, make avizandum to the Lords of Council
 “ and Session with the case, in order to be reported to their
 “ Lordships by the Lords Assessors *quam primum* for their
 “ opinion and direction; and, in the meantime, adjourn fur-
 “ ther proceedings in the courts of service to the
 “ day of .”

Mar. 6 and
 10, 1807.

The Lords Assessors having accordingly reported the case to the Court of Session, their Lordships directed the parties to give in memorials. Memorials were given in, and counsel heard at the bar, whereupon the Lords pronounced this interlocutor: “ Remit to the Macers, with this instruc-
 “ tion, that they prefer the claimant Sir James Norcliffe
 “ Innes, heir male of the body of Lady Margaret Ker, in
 “ the foresaid competition of brieves relative to the estates
 “ and honours of the family of Roxburghe, and to dismiss
 “ the brieve at the instance of Brigadier-General Ker; but
 “ supersede extract until the first box-day in the ensuing
 “ vacation.”

July 7 and 8,
 1807.

General Ker presented a reclaiming petition against the above interlocutor, which was followed by answers, after which the Lords pronounced this interlocutor: “ Remit to
 “ the Macers with this instruction, that they prefer the heir
 “ male of the body of Lady Margaret Ker in the foresaid
 “ competition of brieves relative to the estates of the family
 “ of Roxburghe, on his proving his propinquity; and, in
 “ that event, to dismiss the brieve of Brigadier-General Ker;
 “ and, with these explanations, they refuse the desire of
 “ the petition, and adhere to the interlocutor reclaimed a-
 “ gainst.”

It is needless to repeat the argument here, which is set forth, in so far as General Ker is concerned, in the previous appeal; and, in so far as John Bellenden Ker is concerned, also set forth in that appeal, as well as in the appeal in the action of reduction brought to set aside his right to the estates.

General Ker has brought his original appeal from such
 ts of the above interlocutors as sustain the title of John
 lenden Ker, Henry Gawler, and John Seton Karr, to
 ear and be heard for their interests; and also against
 interlocutors which preferred Sir James Norcliffe Innes
 the competition of brieves. Sir James Norcliffe Innes
 also presented a cross appeal, complaining of the inter-
 locutors, in so far as Messrs. Bellenden Ker, Gawler, and
 on Karr, are allowed to appear for their interests in the
 apetition of brieves. On the other hand, Mr. Bellenden
 r, Mr. Gawler, and Mr. Seton Karr, have appealed from
 , interlocutors of the Court of Session, dated the 6th and
 ned the 10th of March 1807, and the other interlocutor,
 ted the 7th and signed the 8th July 1807, preferring Sir
 mes Norcliffe Innes. And, in order that every point
 ght be kept entire, Mr. Bellenden Ker and the Duke's
 stees presented their cross appeal against General Ker,
 d Sir James Norcliffe Innes, appealing from the interlocu-
 rs dated 6th March and 7th July 1807. Mr. Bellenden
 er and the trustees humbly hope that those parts of the
 terlocutors complained of in the original appeal of Gene-
 l Ker, and in the subsequent cross appeal by Sir James
 orcliffe Innes, which sustains the title of Mr. Bellenden
 er and of the Duke's trustees to appear and be heard in
 e foresaid competition of brieves, will be affirmed; and
 at the interlocutors preferring Sir James Norcliffe Innes
 ill be reversed.

1810.
 —————
 KER, &c.
 v.
 INNES, &c.

For Mr. Bellenden Ker and the Duke's Trustees,—*John*
Clerk, James Moncreiffe.

(Third Appeal—The Reduction.)

JOHN BELLENDEN KER, Esq., HENRY GAW- LER, Esq., and JOHN SETON KARR of Kip- pielaw, Esq.	} <i>Appellants;</i>
SIR JAMES NORCLIFFE INNES, Bart., and JAMES HORNE, his Commissioner,	} <i>Respondents.</i>
JOHN BELLENDEN KER, HENRY GAWLER, and JOHN SETON KARR,	} <i>Appellants;</i>
RIGADIER-GENERAL WALTER KER, and RICHARD HOTCHKIS,	} <i>Respondents.</i>

1810. <hr style="width: 50px; margin: 5px 0;"/> KER, &c. v. INNES, &c.	JOHN BELLENDEN KER, Esq. (in Competition } <i>Appellant</i> ; of Brieves,) SIR JAMES NORCLIFFE INNES, Bart., and } <i>Respondents</i> . GENERAL KER,
---	---

Case of the Appellants in the Three Appeals.

House of Lords, 15th, 16th, and 19th June 1809, 20th June 1810, and 8th June 1811.

ENTAIL—FETTERS—ALTERING THE ORDER OF SUCCESSION—PROHIBITORY CLAUSE.—(1.) A reduction was brought of deeds executed, as an alteration of the order of succession contained in an entail. There were two clauses of destination in the entail, by which different classes of heirs were called. After the *first* clause of destination there followed the prohibitory, irritant, and resolute clauses, which were made to apply to the heirs in that clause, by the terms “before and above mentioned.” It was thence contended that the prohibition against altering the order of succession was made only to apply to the heirs called by the first clause of destination; and, therefore, that the last Duke of Roxburghe, who succeeded under the latter clause, was not bound by the prohibitions. Held that the second clause of destination was to be viewed as a continuation of the first, and that the prohibitory clause against altering the order of succession must be held to apply to the whole heirs of tailzie; and the heirs in the second clause to be viewed as heirs of tailzie to whom these prohibitions applied. (2.) It was further contended that the prohibitory clause, if it did apply, was not in itself sufficient to prohibit the alteration of the order of succession conceived in these words:—“Nor to do any other thing to the hurt and prejudice of thir presents, and of the foresaid tailzie and succession, in hail or in part.” Held these words were sufficient to protect the alteration of the order of succession as in a question between heirs. (3.) A defence was stated to the reduction, setting forth, that as Duke William was the *last* heir of the tailzied destination, he did not hold the estates fettered with limitations in favour of any other heir, (Lady Jane’s descendants having terminated with him, and the destination to the “*eldest* daughter” being confined to her alone), but that he held a *fee* simple estate, and was entitled to make the entail and trust deed in favour of the appellants. Defence repelled.

The progress and investitures of the estates of Roxburghe have been fully detailed in the previous appeal.

It has been seen in what manner the first Earl of Rox-

he completed the tailzied investiture of his estates by deed of nomination and tailzie 1648, and the previous deeds connected with it.

That deed, after expressing the first clause of destination, proceeds to fortify that destination of the estate and city, with such clauses, prohibitory, irritant, and resolute, in the following terms:—"That the saids persons and heirs of tailzie respective shall be halden and obleist to assume and take upon them the surname of Ker and carry and are the arms of the house of Roxburghe," &c. "And in the case of their failing to do so, they, and the heirs male of their bodies, are declared to forfeit the benefit of the tailzie succession. Then it is declared that it shall not be lawful to the persons *before designit* and the heirs male of their bodies, nor to the other heirs of tailzie above written, to make or grant any alienation, disposition or other right, or security whatsoever of the said lands, lordship, baronies, estate and living above specified, nor of no part thereof, neither yet contract debts nor do any deeds whereby the same, or any part thereof, may be apprisit, adjudgit, or victit fra them, *nor yet to do any other thing in hurt and prejudice of their parts and of the foresaid tailzie and succession in haill or in part*, all whilk deeds sua to be done by them are by their presents declared to be null and of none avail force nor effect, reserving always liberty and privilege to our saids heirs of tailzie to grant feus and rentals of sic parts and portions of the said estate and living as they shall think fitting, provided the same be not made nor granted in hurt and diminution of the rental of the same," &c. Next followed the irritant and resolute clauses, by which it was declared that "in case it shall happen the foresaid persons and heirs of tailzie respective above written to failzie in observing keeping and fulfilling of the haill provisions, restrictions and conditions respective above rehearst, and every one of them, in form and manner as is particularly before set down, in that cause the person or heir of tailzie sua failzeand and doing in the contrair, and the heirs male of his body, shall amit lose and tyne in all time thereafter, the foresaid erledome, title, dignity, lands, lordship, baronies, estate and living above specified, and all benefit and right of succession thereto, and the same shall appertain and belong to the next person or heir of tailzie appointed to succeed in manner foresaid, and sua forth successive in caise of several failzies as said is, likeas

1810.

KER, &c.

W.
INNES, &c.

Prohibitory
clauses.

Irritant and
resolute
clauses.

1810. " the person failzier and the aires male of his body sall be
 KER, &c. " halden and obleist to denude themselves *omni habili modo*
 v. " of the said estate and living, and to make and grant all
 INNES, &c. " writs and rights requisit and necessar thereof in favors of
 " the next succeeding person or air of tailzie," &c.

The appellants stated that the entail of the estate and honours thus concluded, was conceived in a form altogether different from that which had been adopted in the deed 1644, but without the smallest mention being made of any of the daughters of Hary Lord Ker as heirs of tailzie, a general devolution or destination of the estate alone, unconnected with the honours, was superadded, and followed the preceding prohibitory, and irritant and resolute clauses, in these words: " And quiks all failzeing be decease, or be not ob-
 Second clause of destination. " serving of the provisions, restrictions and conditions above
 " written, the right of the said estate shall pertain and be-
 " long to the *eldest dochter* of the said umql *Hary Lord*
 " *Ker, without division, and yr aires male*, she always
 " mareing, or being married to ane gentleman of honourable
 " and lawful descent, wha sall perform the conditions above
 " and under written, quiks all failzeing, and their saids aires
 " male, to our nearest and lawful aires male qtsomever."

It was alleged further by the appellants, in their case, that in the copy of the deed 1648 which has been produced, the last destination ends with the words, " our nearest and " lawful heirs male whatsoever," according to which the succession, failing the other heirs, would have descended to the heirs male of the entailer. But in the investitures following the deed 1648, the last words of the destination are " *heirs whatsoever*," not heirs male whatsoever, by which the estate, failing the other heirs, became descendable to the heirs whatsoever of Earl Robert. From this circumstance in the investitures, it is probable that they had been made up agreeably to some other duplicate of the same deed 1648, different from that which has been adduced. But, at all events, the succession ought to be regulated by the terms of the investitures which were made up by William, Earl of Roxburghe, in 1650, and which were ratified in Parliament, and renewed in the same terms, and to the same effect.

John, Earl of Roxburghe, who was a grandson of Earl William, was created Duke of Roxburghe by a patent from Queen Anne in 1707, by which this higher dignity was limited to the heirs of his former titles. He died in 1741,

being succeeded by his eldest son, the second Duke, who died in 1755, and was succeeded by his eldest son, John, third Duke.

In the interval, by the later investitures of the estate, consisting of the deeds executed in 1729, 1740, and 1747, was alleged by the appellants that the destination in the deed 1648 had been effectually altered in such a manner that the heirs of the last clause of destination were totally deprived of their character of heirs tailzie, if they ever possessed it. And by these investitures, which are now established by prescription, the *heirs of tailzie are the heirs of the first destination only*; whom failing, the heirs whatsoever of Robert, Duke of Roxburghe, which all failing, the heirs of the *last destination*, viz. the eldest daughter of Harry Lord Ker."

Sir William Drummond, the second Earl of Roxburghe, died in 1675. He had four sons, of whom Robert, the eldest, succeeded him in the honours and estates of Roxburghe, and John, the youngest, acquired the honours and estate of Bellenden. The second and third sons having died without issue, the family divided into two branches, the elder of which became extinct by the death of John, Duke of Roxburghe, who died in the month of March 1804. He was succeeded by William Ker, Lord Bellenden, who was then the only remaining heir male of the younger branch of the family descended from John, the youngest son of Earl William, and the only remaining heir male of the body of Jean, the eldest daughter of Harry Lord Ker. Thus he was the heir of investiture in two different characters; heir male of the body of Earl William, and heir male of the body of the eldest daughter of Harry Lord Ker.

At the time of Duke William's succession, the nearest relations of the *former Duke* were his sisters, Lady Essex and Lady Mary Ker, the heirs of line of the elder branch of the family. After these ladies, Duke William very justly considered that the appellant, Mr. Bellenden Ker, came next in order, as being the eldest son of the Honourable Mrs. Gawler, who was the eldest daughter of John, the third Lord Bellenden, and the eldest heir portioner of line of the younger, or Bellenden branch of the family.

Duke William succeeded to the estates and honours of Roxburghe, when far advanced in life, after having passed a great length of years in struggling with difficulties and misfortunes. It was natural, therefore, for him to provide for

1810.

KER, & CO.

v.

INNES, & CO.

1810. those who had shared with him those calamities, or who had alleviated his distress.

KER, &c.
v.
INNES, &c.

June 18, 1804. Mr. Bollenden Ker, his father, and his brother, were among the most liberal of his friends, and conceiving that he had full powers to execute the deeds of tailzie and of trust in question, he conveyed his estates, by the deed of tailzie now challenged, failing heirs of his own body, to Lady Essex and Lady Mary Ker, the sisters of Duke John, they being the heirs of line of the marriage between Sir William Drummond and Lady Jane Ker, by the elder branch of that family; after these ladies were called, the appellant and his brother, Mr. Henry Gawler, and the heirs of their bodies in succession, they representing Mrs. Gawler, the eldest heir portioner of line of the same marriage, by the junior branch of the family; and after them were called certain other substitutes descended from John, third Lord Bellenden; but reserving power of revocation, liberty to burden, &c.

By the trust deed the Duke conveyed his whole estates in trust to the Marquis of Lorne, Sir John Smith, of Sidling, William Adam, Esq. of Blair-Adam, Henry Gawler, Esq. of Lincoln's Inn, and John Seton Karr, Esq. of Kippielaw, for the purpose of paying his debts, and certain legacies and annuities, after which the trustees are directed to pay over the residue of the rents, &c., to renounce their infeftments, and to convey the estate to the heir for the time appointed by him in the deed of tailzie above mentioned. The Duke afterwards executed a supplementary trust deed applicable to some lands that had been omitted.

Jan. 1805. Afterwards, in January 1805, the Duke revoked the above deed of entail, in so far as the estate stood thereby conveyed to Lady Essex and Lady Mary Ker, and disposed to himself, and the heirs male of his body, whom failing, to the appellant, Mr. Bellenden Ker, &c. He afterwards, of this

June 8, 1805. date, executed a new deed of entail, by which, on the narrative that he had no prospect of heirs of his own body, and for certain other good causes, he directly disposed, under the conditions therein contained, the said estate, "heritably and irredeemably, to the said John Bellenden Ker, and the heirs male and female of his body, whom failing, to my other heirs of tailzie hereinafter written." This disposition contained all the usual clauses prohibitory, irritant, and resolute, for transmitting the estate to a series of heirs as a tailzied fee.

William, Duke of Roxburghe, died on 22nd October 1805, and a sasine was immediately thereafter obtained on the last tail and trust deed. The appellants were taking other measures for carrying the Duke's settlements, when they were interrupted in their proceedings by two other competitors, being Sir James Norcliffe Innes and Brigadier-General Walter Ker of Littledean. Both their claims were founded on the investitures of 1648.

In these circumstances, they brought each of them actions of reduction against the appellants.

Sir James Norcliffe Innes' reduction sought to set aside the deeds executed by William, Duke of Roxburghe, on the following, among other grounds:—"3. They are all on the face of them so many fraudulent and unlawful contrivances and devices by the defenders, to defeat the standing entails and investitures of the family of Roxburghe, and to break down and dismember the said estate; and obtained from a person having no power to grant such deeds, the said William Ker, designed Duke of Roxburghe, having held and possessed the said estate as an heir of entail, therein fettered and prohibited from granting such deeds by the said entails, and the tenor of his own title following thereon, to the prejudice of the pursuer, the heir of entail."

General Ker's reduction proceeded on the same grounds.

The other grounds insisted on were deathbed, facility, and circumvention, and the want of delivery; but these were little relied on. And the only ground insisted upon was, that the late Duke had no power to grant the deeds in question, in respect that he held the estate under the fetters of a strict entail.

In consequence of these actions, the appellants had a manifest interest to prevent the establishment of any title in the person, either of Sir James Norcliffe Innes, or of General Ker, as heir of tailzie and provision to the late William, Duke of Roxburghe. They therefore appeared in the competition of brieves, and after some discussion, their title to appear in that competition was sustained; and it was Feb. 17 and also found that the question of law, which occurred in the 18, 1806. competition, should, in the first place, be determined, upon which the Court ordered memorials.

The action of reduction having come into Court, the appellants, in the first instance, objected to the title of both pursuers; but afterwards, in consequence of the points set-

1810.

 KER, &c.
v.
INNES, &c.

1810.

KER, &c.

v.

INNES, &c.

tled in the service, they agreed to produce the deeds called for, which was done accordingly, and the action proceeded.

In defence, the appellants maintained various pleas. Generally, they stated, that the rule of construction in the law of Scotland, with regard to all deeds of entail, was strict and that which favoured freedom from fetters. That the question was, Whether the late Duke of Roxburghe, who was vested in the fee of the estate, held that estate subject to particular fetters or limitations, preventing him from executing the deeds in favour of the appellants? They submitted, therefore, that according to all the authorities, and to an uninterrupted course of decisions, from the first existence of entails to the present time, it had been completely settled that, in every such question, the strictest construction must be applied to the clause or clauses from which the limitations are sought to be established; that nothing but the most express words can have the effect of the prohibition; that no such prohibition can be created by inference or implication; and that general words not directed against specific facts or deeds, can in no case be held as effectual. From these they subsumed that it was impossible to hold that the late Duke held the estates subject to fetters and limitations in favour of the other claimants.

In particular, they farther contended, 1. That neither Sir James Norcliffe Innes nor General Ker was at all called to the succession. 2. That supposing one or other of the pursuers to be called by the second clause of destination of the entail, on which they both founded, the entail and the investitures of the estate were so framed, that the prohibitory, irritant, and resolute clauses therein contained, did not apply to, nor in any manner protect, the hopes of succession of that class of heirs to which the pursuers (respondents) alleged themselves to belong. It is plain, that according to the form of the original entail, to which all the subsequent investitures referred, the destination in favour of the eldest daughter of Hary, Lord Ker, and her heirs male, was only introduced after all the restrictive clauses had been previously set down, applying exclusively to the heirs of tailzie "*before written*;" and it was also to this previous class of heirs only to whom the prohibitions and irritancies applied, and the dignity of peerage, as well as the estate, was provided, while the heirs of the second, or *last* clause of destination, were only called to the estate *without* the dignity. And as, on the one hand, there was nothing to be found in

deed by which these restrictive clauses were expressly
 lied to, or made to operate in favour of the heirs of the
 destination ; and, on the other hand, by the settled law
 o the construction of entails, the existence, or the parti-
 ur application of the fetters of an entail, can in no case
 deduced by implication, or without express words ; and
 at all events, the pursuers were, by the later investitures,
 tponed even to heirs whatsoever of Duke Robert, by which
 y were totally excluded from the character of heirs of
 zie, it was contended that the late William, Duke of
 xburghe, was the *last heir* of the *tailzied destination*,
 l so being fettered by no limitations in favour of any
 er class of heirs, he held his estate in fee simple, and so
 l full power to execute the deeds brought under reduc-
 a. 3. That, in point of reality, there was no clause in the
 ail by which any of the heirs of tailzie were effectually
 ibited from altering the order of succession. Although
 re were general words having a reference to other spe-
 l prohibitions, prohibiting any other thing to the preju-
 e of the tailzie and succession ; yet, according to the
 les of construction, which had heretofore been uniformly
 plied to other cases, there was no such express technical
 d unambiguous prohibition against that particular class of
 eds, known by the appellation of deeds *altering the order*
'succession, as could be effectual to set aside the deeds
 ecutec by the late Duke of Roxburghe.

Upon this argument, the Court of Session, of this date, Jan. 13 and
 ronnounced this interlocutor :—“ The Lords having resumed ^{15, 1807.}
 consideration of this cause, and advised the memorials of
 the parties, finds, That the estates of Roxburghe were
 held by the late Duke William under an entail, which
 contains an effectual prohibition against altering the order
 of succession. And find, That the persons called to the
 succession, under the branch of the destination, begin-
 ning with the eldest daughter of Hary Lord Ker, are heirs
 of tailzie under the said entail ; reserving to the defend-
 ers all objections to the pursuers' title, as accords.” *

* Opinions of the Judges.

LORD PRESIDENT CAMPBELL said,—“ The question is, Whether the
 late Duke held his estate under an entail, or in fee simple ? He made
 up his titles as heir of tailzie under Earl Robert's entail, as contained in
 the investitures. Did it then become unlimited by the circumstance
 VOL. V. 2 B

1810.
 ———
 KER, &c.
 v.
 INNES, &c.

1810.

KER, &c.

v.

INNES, &c.

An interlocutor in similar terms, was pronounced in the reduction at the instance of Brigadier-General Ker and his commissioner.

On reclaiming petition, presented by the appellants, the June 23, 1807. Court adhered.

of his having no male issue, and by his collateral heirs male in the first branch of the destination having failed?

"This is not a question with creditors, nor with purchasers, but a question *intra familiam*, having nothing to do with the regulations of the act 1685.

"It is admitted on all hands, that there was another branch or series of heirs called. This is said, in the argument for Mr. Bellen-den Ker, to be a devolving clause, but it is truly a continuation of the substitution, or rather it is a substitution of *return* to the right heirs of the family, failing the stranger heirs to the succession, who are preferred by the first part of the destination. The Drummonds or Flemings were neither heirs of line nor heirs male, nor heirs of investiture. The succession might have gone through them, and the heirs male of their bodies, by their wives. At any rate, the lineal succession was cut off so far as that destination went, and the male succession also excluded.

Ante vol.
ii. p. 449.

"The effect of clauses of return are not sufficiently attended to in the argument. Vide the case of the Duke of Hamilton *v.* Douglas, 9th December 1762. (House of Lords, 8th March 1777, April 1778, and 27th March 1779.)

Vide previous
Appeal.

"The old investitures, prior to Earl Robert's deeds, stood in favour of *heirs male*, who were also heirs in the patent of honour. His charter 1646, under the sign manual, devises both estate and honours to heirs male of his body, whom failing, his heirs and assignees whatsoever, to be named and designed by him by any deed or declaration made by him at any period of his life, with and under the provisions and restrictions to be therein contained. Had he died without any further nomination, it might have been a question of some difficulty, whether these words were sufficient to do away the old line of succession to heirs male in general, and to introduce his legal and lineal heirs, or whether *hæredibus quibuscunque, &c.* were of pliable signification, and to be held as referring to the investitures. But one or other of these constructions certainly must have been put on that investiture. When, therefore, by the nomination 1648, he preferred the families of Drummond and Fleming to take the succession, qualified and limited in a certain manner, and then eventually brought in his granddaughters and their heirs male, and his own heirs male, he did no more than was perfectly natural and just, by restoring the succession to his own heirs; or, in other words, to make a substitution of return in their favour.

"It is a strange perversion of argument to say, that the daughters and their issue were strangers, or that the heirs male of the

In the competition of briefs, the Court, of this date, pronounced the two interlocutors quoted in the previous appeal.

1810.

KER, &c.

Against all these interlocutors the present appeal was brought to the House of Lords.

v.
INNES, &c.

March 6 and
10, 1807, and
July 7 and 8,
1807.

Family were such, and that the Drummonds and Flemings were the natural heirs of the family. The reverse was the case; and a more proper clause of return never was inserted in any settlement than this, whether with or without special limitations is of no importance to the argument, for it is a clear and fixed rule of law, that clauses of return cannot be gratuitously defeated.

"It appears to me, however, that the secondary destination is guarded by special clauses of limitation, as well as the first, very awkwardly indeed brought in, being chiefly by reference to preceding clauses, though partly also by express *provisos* in the clauses which follow.

"The destination to the 'eldest daughter' of Lord Hary Ker, without division, and their heirs male, is limited and qualified by the words, 'who shall perform the conditions above and under written;' for the intermediate words, she always marrying, &c., are clearly parenthesis. The estate was not to be in the husband, but in the lady herself, who alone could perform the conditions of the entail. The utmost that the husband could do would be to take the name of Ker; but every thing else must have been done by the wife. Not only she, but her heirs male, were expressly tied down, as heirs of tailzie to perform the conditions of the entail.

"This also appears from the succeeding clauses. The words, 'Quhilk persons successively designed be us in manner foresaid under the provisions, restrictions, &c., we by thir presents nominate and appoint to succeed us as heirs of tailzie in our hail lands, baronies, earldom, and others, above written, contained in the said procuratories,' &c. This includes the whole persons before named, whether in the first destination, or in the second without destination, and comprehends not only all the conditions, but also all the subjects contained in the former procuratories, &c. *i. e.* titles of honour as well as estate, the reference being extensive and general, without any exception whatever.

"Neither is it of any consequence to say, that the writer in Edinburgh having left so small a share for the second destination, did not probably mean that it should be so ample. We must necessarily take the deed as it is, without indulging such idle conjectures. There was at least more space than could be required for the common termination of heirs and assignees whatsoever.

"All the after deeds and settlements are in substance and effect just a repetition of the original entail 1648. The framer of the

1810.

KER, &c.
v.
INNES, &c.

Pleaded for the Appellants.—The appellants here pleaded in substance the same arguments as above set forth, 1. That neither Sir James Norcliffe Innes nor Brigadier-General Ker is called as an heir by the tailzie or investitures 1648 of

deed 1648 would have done much better to have followed the arrangement in the former nomination 1644. He did not mean to depart from the substance of the first deed, which had been drawn in the country, but, considering himself to be a more skilful conveyancer than Mr. Don, he chose to follow an arrangement of his own, and the blanks being left to be filled up in the country by Mr. Dou, they contrived between them to put it into a most absurd and blundering form, and this seems to have puzzled all the after conveyancers employed by the family. They seem to have thought it best, in framing the after title deeds, to recite the different clause of the original entail precisely as they stood, and so to renew and confirm it without any variation, as indeed none of the succeeding heirs had it within their power to alter the entail in the smallest particular without incurring an irritancy.

“None of these heirs, prior to the last Duke, had any pretension to be the last heir in the first special destination. None of them therefore could safely have done what the last Duke attempted. See the case of Menzies of Culdares.

Ante vol. iv.
p. 242.

“Yet it is argued, that the very first succeeding heir made a very important alteration, by introducing his own heirs and assignees whatsoever, *i. e.* his heirs of line, immediately after the first series of substitutes, and before the second. But this is evidently a mistake in point of fact. Heirs and assignees whatsoever are only introduced upon failure of all the heirs of tailzie, whether first or last contained in Earl Robert's entail. The contrary argument is founded on mere criticism, arising from the absurd arrangement of these deeds, but contrary to the real sense of them. An irritancy would instantly have taken place had so material a change been intended.

“The observations too, respecting the titles of dignity, which is supposed to be now at an end, by the failure of the first branch of the substitution, are much too critical, though, at the same time, it is not *hujus loci* to inquire how or to whom the titles of dignity now go, or whether they have become extinct altogether? The last is a most improbable supposition, as the titles formerly conceived to heirs male were resigned, not for the purpose of earlier extinction, but for the purpose of prolongation, by first carrying them to certain series of adopted heirs, though less connected with the family, and then bringing them back to heirs more naturally connected, both in female and male lines.

“As to the argument upon the clauses against alienation, &c. is

the estate of Roxburghe. 2. That the prohibitory, irritant, and resolute clauses in the tailzie did not operate in favour of that class of persons who are mentioned in the clause of destination, on which the respondents founded their titles, 1810.
KER, &c.
v.
INNES, &c.

the first place, the clause of return alone would be sufficient to bar gratuitous alienation.

"2. The general words, prohibiting the heirs from doing any thing in hurt or prejudice of the tailzie and succession, are likewise perfectly sufficient, upon the grounds fully stated in the memorial for the pursuers. The case of Argaty was of a particular nature, not a permanent entail, but a temporary interdiction. See Lord Strathmore v. Duke of Douglas; Kames' Decisions, Feb. 2, 1720, p. 277; Ure v. E. of Crawford, July 17, 1756, (Mor. 4315); Don v. Don, Feb. 5, 1713, (Mor. 15591.) Rights of succession may be qualified, and will have effect without resolute and irritant clauses. Vide Gibson v. Reid, Nov. 24, 1795, (Mor. 15869.) The act 1685 was made for creditors and purchasers alone. The rights of succession, and questions among heirs and gratuitous donees, are left to common law. Prohibitions to alter may even be implied from the nature of the deed—clauses of return—settlements in contracts of marriage, and mutual settlements. The rules of construction in England ought to be attended to—See Blackstone, p. 376, &c. 500; Fonblanque, p. 442; Lord Mansfield's decision in the case of Duntreath goes inadvertently too far in applying to a question among heirs, a principle which only applies to questions with third parties. General and indirect prohibitions are sufficient against heirs. Suppose the last word alone had been there, it would not have been sufficient against selling or contracting debt, but sufficient against altering the order of succession. If a power to alter is allowed, there are no creditors to enforce even the direct clauses against selling." Stewart v. Home. July 8, 1789. Mor. 15535.

LORD JUSTICE CLERK (HOPE).—"There is no doubt that one or other of the pursuers is heir of tailzie, i. e. they fall under the destination under these titles. But the next question is, Whether the limiting clauses are effectual, and to be held valid in a question among heirs? I admit the principle in the case of Duntreath, but we ought not to overstretch it. The very making of an entail implies unlimited power and unfettered will in the maker, and therefore he may annex what conditions he pleases, which heirs cannot find fault with. It was therefore natural, in this case, to return the estate to his heirs of investiture. The succession might have come very soon to Lady Jane, by the Drummonds and Flemings refusing to marry the daughters of Lord Ker. In short, the late Duke was limited in his enjoyment of the estate, and therefore could not make

1810.
 KES, &C.
 v.
 INNES, &C.

and did not prohibit deeds to their prejudice. That the prohibitory, irritant, and resolute clauses had reference alone to the heirs or substitutes called by the first clause of destination, and did not include or comprehend those substitutes called by the second clause of destination. And, 3. That there was no clause in the tailzie prohibiting the heirs of tailzie from altering the order of succession. This is the natural order of the propositions on which the appellants endeavoured to establish, 1. That the respondents had no title to pursue; and, 2. That their actions of reduction were ill founded on the merits. And, further, if they prevailed in

the entail, because of the conditions under which he himself held the estate."

LORD CRAIG.—"I am of the same opinion."

LORD ARMADALE.—"I doubt if the case of Cassillis applies to this case; but the clauses of limitation apply equally to the whole destination, first and last. But my doubt is on the last point, namely, that there is no sufficient prohibition against altering the order of succession, while strict words are necessary in order to secure this effect."

LORD HERMAND.—"I am clear that the late duke was bound by the limiting clauses in Earl Robert's entail; and, as to the last point, there are *three* distinct prohibitions, the first being directed against doing any thing to defeat the entail, that is, to alter the succession."

LORD WOODHOUSELEE.—"I am of the same opinion."

LORD MEADOWBANK.—"I was of opinion, at first, that the words 'hurt and prejudice,' in the prohibitory clause were feeble, and liker those in the rigmarolle of an adjunct, than of a fundamental separate clause; but I find my doubts removed by Mr. Thomson's bringing forward the language of the act 1685, where, taking a fair comparison between the words of the act and the words in the two prohibitory clauses in the entail, it is impossible to sustain the one as effectual and the other ineffectual; 'nor do any other deed whereby the succession may be frustrated or interrupted;' 'nor yet do any other thing whereby the aforesaid tailzie and succession may be hurt and prejudiced.' I think the last branch of the prohibitory clause sufficiently explicit in order to protect against the alteration of the order of succession."

LORD CULLEN.—"I think the words not sufficiently explicit."

LORD NEWTON.—"I am of the same opinion with the President and Lord Meadowbank as to both points."

LORD BANNATYNE.—"I agree as to the first point, but doubt as to the second. The words are too general."

any one of these propositions, they contended that a reversal of the interlocutors appealed from must follow.

Pleaded for the Respondents.—The persons called to the succession, “as the eldest daughter of Hary, Lord Ker, without division, and their heirs male,” by the deed of nomination in 1648, and all the subsequent investitures till 1804, are heirs of tailzie, and protected by the conditions and limitations contained in these deeds.

The form of expression, by which the heirs under this second branch of the destination were called, is the same which is most commonly used in a clause of devolution, properly so called, *i. e.* where the entailed succession in a certain event, is to be transferred from one branch of the heirs, or substitutes of entail, to another. A similar phrase is also used, where, in express words, it is provided, that on the failure of the heirs of entail, or in any other circumstances, the estate is to return to the proper heirs of the entailer. It is the very same which had been used to indicate the right of those who unquestionably are, and have been admitted to be heirs, *viz.* the persons to whom the right of succession was to fall, in consequence of a forfeiture by any of the prior heirs. And a similar expression is employed in the later investitures for the same purpose. And by the introductory clause or preamble of the deed in 1648, as well as by the clause which almost immediately follows the words of the second destination, they are expressly stated to be heirs of tailzie. It has not been, and cannot be said, that they are not protected in the same manner as the other substitutes against the payment of debts contracted by the preceding heirs of entail; that they were not, like them, obliged to pay the entailer's debts and legacies; the assignment of personal estate too, and also of the writings, was equally available to them; and also, the appointment of tutors and curators, as to any of them who might be in minority, when the succession opened to them; and it would be perfectly absurd to maintain, or to suppose for a moment, that they were not entitled to succeed to the lands afterwards acquired by the first Earl of Roxburghe, or which had not been particularly mentioned in the titles specially recited in the introduction of the entail, although in all and each of these instances, they could be protected and liable, and institute their claims, in the characters of heirs of tailzie only. Whether they were to succeed to the landed property only, or also to the dignities, they must

1810.

 KER, &c.
 v.
 INNES, &c.

1810.
 KEE, &c.
 v.
 INNES, &c.

take as heirs of tailzie, and under a special destination, whereby they are preferred to the proper heirs and representatives of the prior heirs of entail.

But the persons called under the second destination are heirs in the dignity, as well as in the landed property. The words, "the *said* estate," as they are used in the deed in 1648, comprehend the whole right of succession as it stood in the entail, all the different subjects of which it was composed, and, amongst the rest, the title of Earl, and all privileges, pre-eminences, and immunities thereto belonging, having been contained in the same royal grant, and made descendible to the same series of heirs, after having been resigned for that very purpose. It is impossible to doubt the intention of the entail; and the terms used do clearly convey that meaning. The words, "estate and living," had been employed to signify both the landed property and the dignities; but these words were clearly used as meaning the same thing. Indeed, if any distinction were to be admitted, "estate" would be held more properly to mean the dignities than the lands, which would be denoted by the word "living," in ordinary acceptation, and held to import the maintenance or fortune on which one lives; whereas, "estate," at the date of the entail in 1648, as well as at the present time, is employed to signify the whole fortune or circumstances of an individual, including his rank and condition in life, as well as the property of which he may be possessed; but, as the words here were used, no distinction was meant between the one and the other. One clause alone, viz. that which provides for the forfeiture of the heirs, and the devolution of the right of succession to those afterwards called, taken in connection with the words of the second substitution, appears to put this beyond all doubt. The party contravening is to "forfeit the earldom, title, dignity, lands, lordship, baronies, estate, and living above specified," &c., and "the samen" is to appertain and belong to the next person or heir of tailzie appointed to succeed; and the contravening heir is to denude "of the said estate and living," &c. Here there is to be a forfeiture of the dignity as well as the lands. These together, under the general description of the "estate and living," are to go to the next person or heir succeeding. And now, by the second substitution, it is provided that the person so called shall succeed not only, by decease of the prior heirs and substitutes, but also "in case of their failing to observe

conditions," &c. Is it not then perfectly clear that the word "estate," employed in the second substitution, meant to give all that was conveyed in the first substituted by the words "earldom, title, dignity," &c., or by "he and living?" Without this the two clauses would be in complete variance with each other.

The meaning of the entailor that the heirs called by him were to take his honours and landed estates, as one undivided possession, is farther demonstrated by the clause in the 1648, settling his *acquirenda* in the same way with his *relicta*, in these words: "And, moreover, It is hereby expressly declarit, that the heirs of tailzie respectivè having and succeeding to the said estate living and dignity, shall na ways be halden to pay onie debtis or perform onie service contractit or otherwise done be the person or heirs of tailzie quunto he sall happen to succeed ather be service retour or be the failzies above written, excepting als the sick debts as are or sall be auchtand be us the heirs of our decease, quunto our saids heirs sall always be exist. Quhilkis personnes successive designit be us in our ner foresaid, and under the provisions restrictions and conditions above written and na otherwise we be thir heirs pntis to be nominat and appoint to succeed to us as heirs of tailzie in our haill lands, baronies, erledome, and others as are or be written containit in the said prories and infeftments, and in all others lands and heritages pertaining to us the heirs of our decease (and the heirs of our body as said is) and sall be servit retourit enterit and exist thereintil as heirs to us."

On this part of the cause the appellants maintained a similar species of argument; though they fully admitted that the landed estates were destined to the heirs called in the second branch of the destination, they urged that the titles were not also contained in it. In illustration of their argument upon this, they stated, that the respondents understood, or had misstated what was contained in the charter of 1646, as to the erection of the earldom of Roxburgh; that the lands alone, and not the title with the lands, were erected into this earldom; and, coupling this with the deed of nomination, they inferred that Earl Robert contemplated two successions, one of his title and dignity, the other with his lands, to go to certain favoured heirs, for which proper clauses of strict entail: and, beyond that, the destination of his landed estates to those called by the second branch of the destination.

1810.

KER, &c.
v.
INNES, &c.

1810.
 ———
 KER, &c.
 v.
 INNES, &c.

But the argument of the appellants upon this admits of very conclusive answer. This is a question of construction upon the meaning and intention of the entail; there is evidence amounting to demonstration that the Earl himself understood that the charter of 1646 had erected both the honours and landed estates into *one earldom*. In his recit of this charter, in his tailzie 1648, he expressly states his conception of it to be, that the lands as well as the title and dignity were erected "*in an hail and free erledom*." It is obvious from this, that he could have no idea of this supposed division of the honours and estates, or of adapting his nomination to such a divided succession, more especially his natural heirs were called by both branches of the destination. The appellants have no right, however, to argue this matter further, than as to the intention of the entailer.

In the same manner, the acts of Parliament of the 10th June 1648, and 20th May 1667, ratifying the charter 1646 and nomination 1648, recite, that by this charter both the landed estates and the honours had been by it created "*in an hail and free erledom, called the erledom of Roxburghe*."

It may be further noticed on this point, that the royal charters of 1663 and 1687, containing new grants of both the honours and landed estates, are perfectly exclusive of the idea of a divided succession as set up by the appellants.

2. If the persons by the second destination were heirs of entail, it could be of no importance whether they had been in their turn, subjected to limitations or not. It was decided by the case of Cassillis, that unless where the entail ends by letting in heirs or assignees, or heirs whatsoever, the prior heirs or substitutes of entail must continue bound. But there can be no question that, by the deed 1648, as well as by the subsequent investitures, some of the heirs of the second destination, and who are not the heirs or assignees, or heirs whatsoever of the prior heirs, are also subject to limitations, although at one period or other, after it has reached them, the succession will become unlimited. It may be admitted that the eldest daughter was under limitations in favour of the heirs male immediately substituted to her; and, in the same manner, those heirs may stand limited to one another. And various arguments have been used for the other respondent General Ker, which it is not necessary now to enter upon, to show that the heirs male whatsoever of the entailer, who are called in the first place, are also in their turn protected by the fetters of the entail.

But, be that as it may, it is clear beyond all doubt that the heirs of the first substitution were, and that the late Duke of Roxburghe stood, limited in favour of those of the second.

1810.

KEE, & CO.
v.
INNES, & CO.

It has been determined that an entail restraining the power of alienation, might be extended, by reference to another deed of entail, so as to prevent a sale. It had been also determined at a more early period, that when a person had made an entail of his estate, with prohibitory, irritant, and resolute clauses, among others, directed against changing the order of succession, and having thereafter purchased another estate, which he took to himself in liferent, and his second son, and the heirs male of his body, in fee, &c., which failing, to the heirs contained in his former entail, "and under the prohibitions and limitations contained in the said former entail," the second son, and his heirs male, could not gratuitously alter the order of succession, the restraining clauses in the first entail taking place in the second, in virtue of the general reference. But that there could be an effectual reference from one part of a deed to another, whether it related to the order of succession, or sales, or debts, or the irritant or resolute clauses, was never before disputed. Such a power, indeed, is expressly recognized by the enactment 1685, which authorizes entails in any manner or form expressive of the entailer's intention, if it be followed in the way pointed out by the statute, so as to be effectual against purchasers and creditors, as well as against the heirs of entail.

Laurie v.
Spalding,
July 24, 1764.
Mor.p.15612.

Sir Alexander
Don,
Feb. 5, 1713.
Mor.p.15591.

But, in the entails in question, it is surprising how such a question could have been made. It could not have been maintained for a moment, without keeping out of view the words which have been used, and which, in various ways, and most expressly, limit the heirs under the first substitution in favour of those of the second, as well as to one another. (1st.) It is declared, in the outset of the deed 1648, that the heirs of tailzie were to be called under the provisions, restrictions, and conditions after specified, which would have been alone sufficient to limit the heirs afterwards called, in so far as they were not specially exempted. (2d.) The prohibitory clause is not, as the appellants have imagined, or have chosen to assert, confined to the heirs called by the first substitution, and particularly designed before, but reaches the other "heirs of tailzie above written," by which could only be meant the whole heirs of tailzie,

1810.

KER, &c.

v.

INNES, &c.

whom the entailer had previously declared his purpose to call to his succession, although they were not particularly named till afterwards. With this explanation the whole argument arising from the words "heirs foresaid," "conditions above written," &c. as are referable to the persons called by the first substitution, must completely vanish. (3d.) The persons called under the second substitution are to succeed not only by the decease of the heirs previously called, but if these parties "should not observe the conditions, provisions, and restrictions above written," which necessarily gave them in the second substitution a *jus crediti* under the entail, and a title to have the contravention declared with their own right to the estate in consequence. (4th.) It is declared, after the second substitution, that the quhilkie persons *successive* designed (not *before* designed, as in the former clause), are to be "heirs of tailzie, under the provisions and restrictions above written, and no other ways." The deed, therefore, of 1648 is sufficient of itself to prove beyond all doubt that the limitations and conditions were applicable to both classes of substitutes.

3d, Even without any special prohibitions, the persons called under the first class of substitution were, by the tenor of the deeds, and the circumstances of the case, debarred from gratuitously altering the order of succession; the words being, in effect, a clause of return in favour of the heirs *alioqui successuri* of the entailer; and where ever there is a clause of return this fetters the heir of tailzie from disappointing that return. It was not necessary that the word "return" should be used in the clause, if the intention of the entailer was fully expressed to that effect. It could make no difference, that instead of the estate, or right of succession, returning to the granddaughters of the entailer, as heirs portioners, it had been necessarily destined, as a dignified fief to them successively, one after another; and it was of no importance that, by some of the more ancient investitures, and with regard to particular lands, heirs male had been called, or that, on the failure of the heirs *alioqui successuri*, other heirs, not entitled to the succession *ab intestato* had been called. By the various procuratories of resignation and crown charters which have been noticed as preceding the deed of nomination in 1648, the whole former destinations have been done away. The determination of the Court, in Douglas case, was not that a clause of return was ineffectual to bar gratuitous alterations of the succession, but that the claim there

Dict.—Fiar—
Absolute—
Limited,
ut supra.

ended on a clause of return, had been cut off by the negative and also by the positive prescription, thus clearly renouncing its general effect, as had been previously done by numerous decisions.

L. The late Duke of Roxburghe was expressly debarred from altering the order of succession, as prescribed by the act in 1648 and after settlements. It will be remembered, that the Duke and his advisers had not the most distant idea that this could be disputed. The grounds on which, after much and repeated deliberation, he thought himself authorised or justified to exclude the proper heirs and representatives of the family and honours of Roxburghe from the estates to which he had succeeded, was not that the entails did not contain an effectual prohibition against altering the order of succession, but that the whole prohibitions and limitations had come to an end, and that he himself was *the last heir of entail*." It may be doubted whether the Duke would have availed himself of such a plea or defence or frustrating the heirs called, if he had believed such to exist. But it does not augur much for the justice or legal soundness of the argument on which the appellants now almost wholly and exclusively rely, that it did not once occur to the late Duke, or to any of the able and numerous counsel to whose assistance he resorted in framing his settlements. It is beyond all doubt that, by the common law of Scotland, the owner of lands might, by any express declaration of his will, debar his successors from altering the order of succession. And it is quite a mistake to say, that a general prohibition to do nothing to the prejudice of the tailzie or succession annexed to a nomination or substitution of heirs will not be effectual to prevent gratuitous alienations, whether *inter vivos* or *mortis causa*. The contrary is laid down by all our lawyers, and completely fixed by decisions. Vide Dirleton *voce* Tailzie (B. ii. t. 3, § 59). And Rankton to the same effect, B. ii. t. 3, § 139. So Erskine, B. iii. t. 8, § 22, 23.

In the case of *Bruce v. Forsyth*, where a person had disencumbered his lands under a condition "that it shall not be lawful to the said James Bruce, nor to any of the subsequent heirs of tailzie, to do any act or deed whatsoever that may frustrate or prejudice the tailzie or course of succession;" the Court held it did not protect against contracting debts, but was effectual against altering the order of succession. In like manner, in the case of *Scott Nisbet v. Young*, Nov.

1810

KERR, &c.
v.
INNES, &c.

Fountainhall,
Mar. 11, 1707.

1810.
 KERR, &c.
 v.
 INNES, &c.
 Ante vol. ii.
 p. 98.

1763, (House of Lords, 21st Feb. 1765,) the clause, to any "acts or deeds in prejudice of the other heirs, their right of succession," it was not even imagined that the heir could alter, though the deed was not sufficient to prevent alienating the estate.

5. The authorities and decisions quoted by the appellants are altogether foreign to the issue. Although inferred from the presumed will of an entailer, in general, he is precluded, at least when the question is with purchasers and creditors, a full and fair effect must be given to the words he has used. Although prohibitions are not to be implied, those he has expressed are to be enforced according to their true sense and meaning; and although no regard is to be paid to intention not expressed, it is surely not enough to disappoint an entailed settlement, that ingenious men, who it is for their interest, can invert and confound words into double or no meaning. While entails are permitted, it would be most extraordinary if courts of law were to give their sanction to every possible device for the purpose of disappointing a settlement which the owner of lands has made with such laudable views.

After hearing counsel for many days on the three preceding appeals,

(*First Day.*)

15th June 1809.

LORD CHANCELLOR ELDON said,—

* "My Lords,

"Before I proceed to state to your Lordships my humble sentiments upon the points, or several of the points, which have been discussed in the questions, which have been long in agitation before your Lordships, with respect to the estates and honours of the late Duke of Roxburghe, you will allow me first, in a few words, to explain the reasons which induce me to adopt the course which your Lordships will perceive in the sequel of what I have to state to you, appears to me, under all the present circumstances of the case, the most advisable.

"My Lords, After your Lordships had heard at the Bar a great deal of most able argument, upon various questions relative to the landed property, I mean, in the first place, the question, Who were to be considered as heirs of tailzie under the deed, which, your Lordships will recollect, was executed in 1648? upon the question, How far that deed, by its prohibitory, irritant, and resolute clause, had forbidden an alteration of the course of succession? upon the

* From Mr. Gurney's short-hand notes.

question, What is the effect of a certain clause to be found in that deed, which described the eldest daughter of Hary Lord Ker and their heirs-male? upon the important question, What is the meaning and import of those words "their heirs-male," as the words occur in that clause of the deed of 1648? upon the questions which arise, with reference to the effect of subsequent instruments, executed from time to time down to 1747, and the effect of length of time operating as prescription; and a great variety of other important questions, which it is not necessary now to detail to you; it occurred to me, that some of the same questions which were to be decided with reference to the title to the landed estates, must also be decided by your Lordships, first in a Committee of Privileges, and afterwards by the House, upon a report from the Committee of Privileges; and that it was at least advisable, therefore, that such a number of your Lordships as are necessary to constitute a Committee of Privileges, which, your Lordships know, is a larger number than is necessary to constitute a House sitting either in judicial or legislative business, should proceed to some extent: That, with a view to avoid the danger of coming to different decisions, where those decisions appear to be on the construction of the same instruments, in the House and in the Committee, though decisions applied to different subjects, to dignities in the one case, and to landed property in the other, it was at least advisable your Lordships should go to a considerable extent, in the Committee of Privileges, in your enquiries with respect to the dignities. And, my Lords, I certainly had a very strong persuasion, that if, without that delay, which operates mischievously and injuriously, your Lordships could, in the first instance, decide altogether the questions as to the dignities, before you came to a determination upon the questions as far as they respected the landed estates, that would be a most desirable course for you to take. Upon reflection, however, it does appear to me, that if your Lordships shall suspend your judgments upon the points in litigation with reference to the landed estates, until you shall be able to come, consistently with your own rules of proceeding, to a decision upon the dignities claimed, it must be attended, of necessity, with a tedious procrastination of this business, and with a delay before you come to judgment, which I am afraid would operate too severely upon the parties. I cannot, therefore, permit myself further to recommend to your Lordships that course of proceeding.

"Your Lordships will recollect, that the dignities claimed are, Remarks on that of the Dukedom of Roxburghe,—the Earldom of Roxburghe the Titles and and the Barony of Roxburghe,—the Marquisate of Beaumont and Dignities Cessfurd,—the Earldom of Kelso—the Viscounty of Broxmouth,—and the Lordship of Ker of Cessfurd and Caverton. I need not put your Lordships in mind, because I am sure it will be in your recollection, that the deed of 1648 applies only to the Earldom of Roxburghe; that the patent of Queen Anne, by which she granted

1810.

KER, &c.

v.

INNES, &c.

1810.

KER, &c.

v.
INNES, &c.

to the then Earl of Roxburghe the Dukedom of Roxburghe, does not, if I collect its effect rightly, confer any other dignity: It limits the Dukedom of Roxburghe to the Duke and his heirs of tailzie entitled to the Earldom of Roxburghe. But in the course of so much argument as we have had at the Bar with respect to these titles, we know nothing more of the creation of the Lord Roxburghe who was created early in the century before the last, except that there was such a creation. We have not had laid before us what was the origin of the titles of Lord Roxburghe, and Lord Ker of Cessford and Caverton; and before we can come to a decision upon the claims to those dignities, the history of all those dignities must be circumstantially and accurately laid before us.

“ My Lords, It will be necessary also, if we are obliged to content ourselves with as little of information respecting many of these dignities as we have hitherto had, to come to a decision upon the question, what it is that the law, with respect to dignities, authorises us to presume to have been the contents of instruments not produced; what limitations we are by presumption, legal presumption to suppose to have been contained in those instruments which are not produced. I need not tell your Lordships too, that I believe this would be the very first case which ever occurred in judicature in this House, I mean judicature with respect to titles and dignities, in which your Lordships have ever come to abstract decisions as to what was the effect of instruments appearing, or passages contained in instruments producible, and what was the effect of the law with reference to presumptions upon the probable contents of instruments that cannot be produced before you. Your Lordships have had at your Bar persons who have proved themselves, by establishing their pedigree and propinquity, to be individuals who had a right to call upon you for some decision upon such subjects. It would be a new proceeding in this House, with respect to titles and dignities, that we should be deciding upon the rights of parties, who, for aught we know at this moment, may not have been at your Lordships Bar; coming to decisions, therefore, which might eventually not benefit those who have been at your Lordships Bar, and which unquestionably could not operate against those who had not been there.

“ My Lords, By the course, however, which your Lordships adopted, in referring it to the Committee to take into their consideration, whether the titles and dignities under the charter of 1646 and the charter or deed of 1648 were conveyed to that series of heirs who are called to succeed to that property, by that clause of the deed in 1648, beginning with the words, ‘ and ilkis all failzie- ing be decease, or be not observing of the provisions, restrictions, and ‘ conditions above written;’ and by another direction which your Lordships House gave to the Committee, to take into their consideration what was the effect, with reference to the dignities, of the words ‘ heirs-male,’ contained in the deed of 1648, you have secured

to yourselves the benefit of a further and repeated discussion of those points before a more numerous audience than that which constituted the House when the same points were under consideration with reference to the landed estates. If, therefore, there is a danger of our miscarrying in judgment when it is now proposed to your Lordships to take under your earlier consideration, how you should determine the questions with respect to the landed estates, the House has at least secured to itself this benefit, that there has been given a repeated opportunity, and to a more numerous body of your Lordships, the opportunity of considering those very questions; and if any of your Lordships who attend the Committee of Privileges thought it fit to object, by reason of what they had heard in the Committee, to any determinations which shall be proposed, and which, directly affecting the lands, may also consequently affect the honours, it is open to any of you so to object. Besides that, there has been another advantage gained by the mode of proceeding, and that is, that your Lordships have had under your consideration, how far it can be said that the honours are affected by this deed of 1648; a consideration which was represented at the Bar to be material, as undoubtedly it is in some degree, and in an important degree, to enable you to decide what is the effect of many of the words, the meaning of which has been in controversy, which occur in the deed of 1648, with regard to the landed property, as it will be in your Lordships recollection that it was contended, that an opinion upon the question, whether the honours passed by that deed, might enable you the better to conclude what was the right judgment as to the construction of the words that occurred in that deed of 1648 with respect to the landed property.

"My Lords, To this extent, it appears to me, the course your Lordships have taken has been useful; but I own I cannot myself approve our proceeding in that line of conduct further: but your Lordships must determine, whether you think it right to pursue that line of conduct throughout, and to the end. And the consequence of that, it is too manifest, must be this, that your Lordships cannot give to these litigant parties at the Bar any opinion in judgment upon the title to the lands, till that time shall have elapsed, which it appears to me is no very short period, till you can have had before you all those proofs which would justify you, according to the usages of this House, to come to a determination upon the titles to all those dignities, and upon all the questions of law that affect each of them; and all the questions of fact that affect the claims of those who are contending before your Lordships, and calling upon your Lordships to give his Majesty your advice in their favour with respect to those dignities.

"In this state of things, it has occurred to me, that your Lordships would pardon me, if I presume now to ask your permission to give my own opinion at least upon the points which have been un-

1810.

KER, &c.
v.
INNES, &c.

1810.

KER, &c.

v.

INNES, &c.

der consideration in the question relative to the estates ; and whatever your Lordships may think proper to do after that opinion is delivered, I shall at least retire from this House with the satisfaction of recollecting, that, as far as any industry on my part,—any attention on my part,—any diligent investigation of this subject on my part, can be of use to the parties, or to your Lordships, I shall not have run the risk of withdrawing from your Lordships, or those parties, the humble assistance that I may be able to offer, or have run the risk, perhaps, of not having another opportunity to offer that assistance. In the course of last summer, I do assure your Lordships, that this matter lay very painfully upon my mind. It has affected that mind very painfully ever since: it still does so; and I hope your Lordships will excuse me, if I take the present opportunity of relieving myself, by declaring my opinion, as far as I can, upon the subject: and for the purpose of doing this, I must recall to your Lordships attention, with as much of accuracy as I am able, the facts of this case, as the case relates to the landed property.

“ My Lords, I am as little a friend, upon principle, as any body can be, to the notion of construing the meaning of one deed by another, certain what is the meaning of another, more especially if the purpose of the latter deed be to alter the effect of the former; but still it is necessary to state to your Lordships the history of the titles, for two reasons: First, Because I do apprehend it is perfectly competent to every court of justice, when it is construing an instrument, to look at other instruments with a view to determine what is the language and style, and what is the phrase of the law, or of those who are conversant with the law; but, more particularly, I am desirous to state the history of the title to your Lordships, because I am extremely anxious that the parties should themselves be satisfied that we have not overlooked any of those facts, or circumstances, which they have thought sufficiently material, and sufficiently important, to be made the topics of reasoning and argument at your Lordships Bar.

“ My Lords, As Colonel Walter Ker states the history, and, for the purpose for which I am now addressing myself to your Lordships, I will take it to be correct; he says, that in the beginning of the fifteenth century, a person of the name of Andrew Ker of Altonburn, was the head of a distinguished family of that name on the southern border of Scotland; that he had three sons, Andrew, James, and Thomas; that from these respectively descended the families of Ker of Cessford, of Lynton, and of Gateshaw. He states, that in 1467, Andrew, the eldest son, obtained from the Crown a grant of the lands of Cessford; that those were limited to the heirs-male of the institute, and all the substitutes, and the heirs-male of their bodies respectively, and, upon default of them, to the nearest true and lawful heirs whatsoever of Andrew Ker. My Lords, in 1474, he represents, that this Andrew Ker resigned the lands of Cessford, and

obtained a charter from the Crown, granting them to Walter Ker, the son and heir-apparent of Andrew Ker of Cessford, and his heirs-male lawfully begotten, and to be begotten; in failure of them, to Thomas Ker and his heirs-male; in failure of them, to William Ker, and his heirs-male; in failure of them, to Ralph Ker, and his heirs-male; and in failure of all of them, to the nearest lawful heirs whatsoever of the said Andrew Ker.

“My Lords, He states a great variety of other charters, particularly, I think, a charter in the year 1542, another charter in 1553, and another in 1573, all of which, it may be represented to your Lordships, as it has been represented from the Bar, keep alive the right to the estate in a male-succession, confining the right to a male-succession; and it is indisputable, that according to this claim, which, for the present I presume to be made good, when Robert, who was the first Lord Roxburghe, created by his patent Lord Roxburghe, which patent does not appear, and who was afterwards created Earl Roxburghe, that, when that Earl Roxburghe was seised of the estates, he had them vested in him descendible to a male line, and to a male line only.

“My Lords, I am anxious to state this circumstance distinctly to your Lordships, and I have stated it repeatedly, for the purpose of stating it distinctly; because it will be within your Lordships recollection that it has been contended, that it might at least be probable, that as this estate had come in the male line, according to the history of it, from the year 1467, down to the year 1648, that the first Earl of Roxburghe did not mean to disturb that species, and that line of succession, beyond that degree, and beyond that extent, in which he has, in the most express terms, disturbed it; and I, therefore, stop here one moment to say, that previous to the year 1643, previous of course to 1644, when there was one charter or deed, as your Lordships recollect, executed, and (previous) to 1648, this Earl had these estates descendible to the male line of heirs, heirs-male of the body, and heirs-male in general.

“My Lords, The then Earl of Roxburghe was not prohibited, by any of those clauses which, in Scotch entails, have that effect, from making an alteration in the order of succession; and accordingly, in the year 1643, it appears that he granted several procuratories of resignation, comprehending his honour, and comprehending all his estates, for a new investiture, to be given to himself, and the heirs-male to be lawfully procreated of his body, which failing, to his heirs and assignees, in his option, ‘to be designat, nominat, made, and constitute’ by him, at any time in his lifetime, or before his decease, by assignation, designation, or declaration, under his hand-writ, and under the provisions, restrictions, limitations, and conditions therein to be contained.

“My Lords, In the course of the same year, it appears that he granted a bond, which is printed as No. 3. in the appendix to

1810.

KER, &c.

v.
INNES, &c.

1810.
 ———
 KER, &c.
 v.
 INNES, &c.

Colonel Walter Ker's case, proceeding upon a narrative of the procuratories of resignation ; and by that bond he obliged his heirs male, as well gotten of his own body as his heirs-male of tailzie a provision whatsoever, to ratify them in favour of the heirs who he should nominate, and to renew them in case of his death, without having completed his proposed investiture by charter and infeftment.

“ My Lords, I ought to have mentioned to you, before I had come so low down in the history of these transactions as the year 1640, that Hary Lord Ker, who was in the year 1640 in life, did, that year 1640, execute an instrument, to which a good deal of attention seems to be due, and, with reference to which, considerable argument, and, in some respects, weighty argument, as bearing (far as one can borrow argument from one deed and apply it to another) upon the deed of 1648, was drawn, and addressed to your Lordships from the Bar. That was the bond of tailzie executed by him on the 18th July 1640 ; and that bond of tailzie is to this effect :—He binds and obliges himself and his heirs, to make due and lawful resignation of all and sundry the lands and barony of Primside, comprehending the particular lands mentioned in the infeftment grant to Robert Earl of Roxburghe, Lord Ker of Cessford and Caverto his father, and to himself, in fee thereof, and so of all the townlands, and Mains of Sprouston, with houses, biggings, mills, and pertinents thereof, wherein he, and Dame Margaret Hay, Lady Ker, his spouse, (who, your Lordships recollect, is mentioned in the deeds of 1644 and 1648), are infefted by virtue of their contract of marriage, and also of all the lands of Sprouston called the West End of the Town of Sprouston, and so on, acquired from John Lord Cranstoun, and of the barony of Browndoun, with the pertinents, conquest and acquired from John Earl of Traquair, wherein his father is infeft in liferent, and he in fee, and several other premises, for a new heritable infeftment and seisin to be given to him the said Hary Lord Ker, and to the heirs-male lawfully gotten or to be gotten of his body ; which failing, to Lady Jean Ker, his ‘ eldest dochter.’ Then follow these words, which, in this instrument, are extremely material words, as furnishing, in one way of putting the case, a construction upon similar words in the deed of 1648. Your Lordships recollect, or will be put in mind when I come to state the deed of 1648, that a limitation is contained in that deed, to the eldest daughter, in the singular number, of the late Hary Lord Ker, *without division*, and *their* heirs-male ; and it has been contended below, and it has been insisted upon in judgment, and has been contended here, that those words, ‘ *without division*,’ of themselves, go to the length of proving, that the words ‘ eldest daughter’ must be considered as a plural term,—as a term which, though the expression is singular, must be taken to denominate a class of persons. Now, my Lords, it is impossible to say, that the

words, 'Lady Jean Ker' can be taken to express a class of persons; for though the words 'my eldest daughter' may in many cases be taken, I think, in our law, and I think also in the Scotch law, to mean a class of persons, yet when they are prefaced by the express name of an individual, they cannot mean a class of persons. The words here, in this bond 1640, are these: 'Lady Jean Ker, my eldest daughter.' That can mean Lady Jean Ker, and that individual only. And then follow the words '*but division*,' the meaning of which is the same precisely as *without division*; and that does shew this fact, that the words without division may be used, in a Scotch conveyance, with respect to a female taking, without its being the necessary inference from those words *alone*, that the singular term is meant to comprehend a class of persons. On the other hand, it certainly will not follow, if the words '*without division*' are usually applied as words which are to separate the enjoyment amongst persons who are described by a singular term, as, for instance, if the words were 'heirs-female *without division*,' the effect of which I shall have occasion to state to your Lordships presently, it cannot, I say, on the other hand, be contended, that they are words to which no weight whatever is to be ascribed, when you find them, in the deed, following a description which *may* either mean one individual, or *may* mean a class of individuals.

My Lords, There is another clause in this instrument, which it is necessary, in the history of the transactions of this family, to point out to your Lordships, as that upon which argument has likewise been offered to you, though I do not find that it was submitted to the Court below, which certainly is a passage of some importance. There are two passages, indeed; but there is one passage in this, which certainly is a passage of great importance: 'In caise it shall happen the said Lady Jeane, my eldest daughter, and failzing of her be decease, the said Lady Anna, her sister;' her sisters Margaret and Sophia are not mentioned in this instrument, 'to succeed to the lands, baronies, and utheris above specified, be virtue of this present bond of tailzie and resignation, and infestment following thereupon; then, and in that caise, it is speciallie provydit, that my said daughter sua succeeding, sall be halden and obleist to marry and take ane husband of honorable and lawful descent, (be the advice of her maist honorable friends), who sall assume and tak to him the sirname of Ker, and carry and bear the arms of the hous of Cessfurd, and the bairns' (perhaps your Lordships do not know that that means children) 'to be procreate of the said marriage sall continue in the samyn sirname of Ker, and beir the arms of the said hous of Cessfurd in all tyme thereafter; or in caise my said daughter sua succeeding sall happen to marry ane husband of greater quality, be advice of her saids honorable friends, sua that he may not take the said sirname and arms, than, and in that caise, the *second son* procreate of the said marriage sall suc-

1810.

KER, &c.
v.
INNES, &c.

1810.

KER, &c.
v
INNES, &c.

'ceed to the lands, baronies, and utheris speciallie and generally
'above mentionat, and, be providit thereto, who sall take upon him
'the said sirname of Ker, and carry and bear the arms of the said
'hous of Cessfurd, and he and his heirs sall continue in the same
'sirname and arms in all time thereafter.'

"My Lords, I presume to call your Lordships attention to this passage, because I think it cannot escape your observation, that it is extremely possible, judicially, to put a plural signification upon the singular term, which here occurs. The case put there, your Lordships see, is that of this Lady marrying a husband of greater quality, the consequence of which would be, that her eldest son would take the name and arms of that husband of greater quality, and not the name and the arms of the person who executes this bond. He then goes on to say, that the *second son* procreate of the said marriage 'shall succeed to his lands, baronies, and utheris, and bear 'the name and arms of the hous of Cessfurd, and shall so continue.'

"Now, my Lords, I think it would be a very narrow construction of this, to say, that these words, '*second son*,' can mean nobody but the son of that marriage who is *second born*, that is to say, that if there were four sons of that marriage, and the individual actually second born should happen to die, the third son would not be the second son within the meaning of this; or if the third son had died, that the fourth son would not have been the second son within the meaning of this; and if it could be said, as it can be, I think, that the third son was an individual who might become the second son in a certain event, it would be difficult applying these rules to a Scotch instrument, to say that this singular term, *eldest dochter*, even in this ancient instrument in 1640, might not, in given events, be a term sufficiently available to describe a class of persons taken successively, or a class of persons taken in this sense, that in one event one would take, in another event another would take, and in another event a third would take.

"The deed then proceeds to state, that if it should happen that the said Lady Jane his daughter, and failing of her, Lady Anna, her sister, also his daughter, or any of them who should happen to succeed to these lands, baronies, and so on, by virtue of that tailzie, to fail in doing or fulfilling the premises, then it is specially provided, that the infeftment, and that present bond made thereanent, so far as concerns her part thereof, should be null, and of no avail from thenceforth, as if she were naturally deceased, and the next person provided to the lands and others aforesaid by virtue of that present bond of tailzie, should succeed thereto; and his said daughter and her heirs so failing, shall be holden and obliged to denude themselves of the right of the lands, baronies, and others, to and in favour of the next person provided thereto by this present tailzie. Here is also a singular expression, 'the next person provided thereto by this present tailzie,' which would not mean, your Lordships observe, the

person who, at the instant of executing this tailzie, was the next person provided thereto, but the person who, at the time that tailzie took place, was the next person provided thereto, and who would, under this instrument, have a right to take the benefit meant in the case of a failure of the daughters and their heirs-male, to be given to the next person then provided thereto; but here also is, in a sense, a singular term, describing more persons than one, though eventually describing but one person.

1810.

KER, &c.

"

INNES, &c.

" My Lords, Having stated to your Lordships the effect of the bond of 1640, I return to what I was before about to mention to you, the charter of 1644. I give it the name of charter, though perhaps it would be called with as much propriety a deed of designation, nomination, and tailzie. In this, it is necessary to point your Lordships attention to the circumstance, that, towards the close of it, there is a clause, which, for want of a better word to apply to it, I would describe as a power of revocation; and, notwithstanding what has been argued at your Lordships Bar with respect to this instrument, that, on the one hand, it has been said, that it is an absolute nullity, that it is altogether revoked; and, on the other, it has been insisted, that it is still an existing instrument,—that it has been carefully kept in the charter-chest,—that it was found with the other muniments and documents of the title; it does, I confess, appear to me to be an instrument, that, whatever might be its effect between 1644 and 1648, it is in this sense a revoked instrument,—that it is an instrument which, except in a very limited way, which I shall hope to point out to your Lordships distinctly by and by, cannot affect the limitations contained in the deed of 1648, or the limitations contained in the subsequent instruments which regulate this title. At the same time, this deed of 1644, in my apprehension, is a deed which is not to be altogether overlooked by your Lordships, when you are endeavouring to collect, not what the author of the deed meant to do, but what is the meaning of words in an instrument of conveyance, which an individual has actually used, when he has used the same words in both instruments. I cannot, for instance, with reference to the deed of 1648, contend, consistently with any notions I have of law or of evidence, that because the author of the deed of 1644 expressly created a succession among the daughters of **Harry Lord Ker**, by express and technical limitations, that therefore he intended to do the same thing in the deed of 1648. I must, according to my notions of law and of evidence, find in the deed of 1648 itself, that he has done it; and I can never infer, I think, rationally, from a deed executed in 1648, which, *ex concessu*, was meant as a deed to bring about some alteration, that because he intended a particular provision by the deed of 1644, and because you collect from the deed of 1644, that according to that intention to create particular limitations, he did actually create them, you are therefore to infer he did the same thing in 1648, unless, upon look-

His opinion as to the rules of construction.

1810.
KER, &c.
v.
INNES, &c.

ing into that instrument of 1648, you find he did actually so do. But I take it to be equally clear, that there may be more ways than one of doing the same thing. I apprehend, that if, upon looking into two instruments, you find the same expressions, you may form an opinion, that they have the same meaning in each. It seems to me to be a legitimate purpose, to look at different instruments, to see how, in the language of conveyancing, singular terms are employed to describe a plurality of persons; and I think that you may legitimately reason in the same way from the deed of 1644 to 1648, as I took the liberty, in a short word, to do, from the bond of 1640 upon the words 'but division,' with reference to the term 'without division' in the deed of 1648.

"I ought to state to your Lordships what was the state of the family of this Earl of Roxburghe in the year 1648; and it is necessary to do so, with a view to call back to your Lordships recollection the reasoning which has been offered on both sides; on the one side the reasoning holding forth the eldest daughter of Hary Lord Ker as the *persona delecta* of the Earl of Roxburghe in 1648; on the other, the reasoning which has aimed at representing as a gross improbability the supposition, that the Earl of Roxburghe could mean to give exclusively to his eldest daughter, without giving to his younger daughters, that which he had not given exclusively to his eldest daughter marrying a Drummond, but had given to all his daughters, if they married particular persons pointed out to them; it is, I say, necessary to call back your recollection to the state of the family at this time: because on referring to the state of the family, your Lordships will see, that there was great ground for that which was urged; I mean, that the provision made by the charters of 1644 and 1648, with reference to the actual state of the Earl's family, is a provision in itself so whimsical, that it is difficult to argue at all from any supposition that any persons were his *personæ delectæ*; and that there is as good ground for arguing, as they have argued, that he overlooked the three younger daughters of his son Hary Lord Ker as that he should overlook the children of other younger branches of his family.

"In the year 1648, it appears that Hary Lord Ker was dead. His father, the first Earl of Roxburghe, had been twice married. He first married Mary, the daughter of Sir William Maitland, by that marriage he had one son and three daughters,—William Master of Roxburghe, who died without issue,—Lady Jane who married the second Earl of Perth, and had issue,—Lady Ker, who married Henry Lord Dudhope, by whom she had one son,—and Lady Isabella Ker, who married, first, to Halybur Pitcur, by whom she had no child, and, secondly, to James Southesk, by whom she had children. Lady Jane Ker, who married John the second Earl of Perth, had issue, Henry Drummond, who died without issue,—James, who was :

Earl of Perth, who had several sons and daughters,—his third son, John Drummond, had issue,—his fourth son was Sir William Drummond;—and she had also two daughters, Lady Jane Drummond, who married John, the third Earl of Wigton, by whom she had six sons and two daughters, and Lady Lillias, who was married to James Earl of Tullibardine, by whom she had issue. My Lords, Lady Jane Drummond, who married the Earl of Wigton, had issue, John Lord Fleming, who was the fourth Earl of Wigton, and who married Lady Anna Ker, second daughter of Hary Lord Ker,—Robert Fleming, Henry Fleming, James Fleming, William Fleming, and Charles Fleming. This is the state of his family by his first wife.—The following was the state of his family by his second wife. Hary Lord Ker was dead. Hary Lord Ker had left behind him, Lady Jane, Lady Anna, Lady Margaret, and Lady Sophia Ker.

“In this state of the family of the Earl of Roxburghe, he executes the deed of 1648; and in executing that deed he passes over his eldest daughter Lady Jane Ker herself: he does not pass her over absolutely, because he makes a provision for some of her issue; but with respect to any personal provision for her own individual benefit, he passes her over. His next eldest daughter by his first marriage, Lady Mary Ker, he takes no manner of notice of;—his own still younger daughter by his first marriage, Lady Isabella Ker, he takes no notice of: so that, looking to this instrument of 1648 as a provision for the family, it appears that he makes no provision for Lady Jane Ker, the eldest. He does not limit the estate to her, but he does, in the manner I shall mention, limit the estate to one of her sons, (4th son, Sir Wm. Drummond,) and he passes over, in making this provision for the family of the eldest daughter, he passes over his own youngest daughters altogether, and takes no manner of notice of them. His first limitation is to Sir William Drummond, who was, upon the pedigree I have stated to your Lordships, fourth son of the Earl of Perth, passing over the three eldest sons. After Sir William Drummond, he proceeds to take as his second substitute Robert Fleming, who was the second son of the eldest daughter of Lady Jane Ker. He passes over, therefore, the eldest daughter of Lady Jane Ker herself, but makes a similar provision for one of her children that he had made for Sir William Drummond, one of the children of Lady Jane Ker, and he then makes his third substitute Henry Fleming, his fourth James Fleming, his fifth William Fleming, and his sixth Charles Fleming, passing over again both his grand-daughters, Lady Jane Drummond, afterwards Lady Wigton, and the Lady, afterwards Lady Tullibardine; so that in the line, your Lordships observe, which descended from his first wife, he makes no provision for his own first daughter, though he does for the descendant of that daughter; he passes over his own younger daughters, and, when the descent goes on further from him, he passes over three sons of Lady Jane Ker, his eldest daughter, he passes over the first son of Lord

1810.

 KER, &C.
 v.
 INNES, &C.

1810.

—
KER, &c.
v.
INNES, &c.

Wigton, and then he proceeds to limit the estates to the second and other sons of Lord Wigton, passing over his youngest grand-daughters, the daughters of Lady Jane Ker ; from which it is argued, and I take notice of the circumstance, in order that the parties may be satisfied that I have noticed it, that, if he could pass by his own younger daughters, and his own younger grand-daughters by his first marriage, and could give a preference to the descendants of the eldest grand-daughter by the first marriage, it could hardly be predicated of him, that, with respect to the grand-daughters of the second marriage, he could not mean to make the same sort of provision, and pass over the three youngest of those grand-daughters.

“ My Lords, This deed of 1644 contains some passages which think ought to be pointed out to your Lordships attention ; not, say, as evidence that he who made the deed in 1648 meant the same thing as he meant by the deed of 1644, when his purpose in 1648 was to revoke the deed in 1644, and to make other provisions ; but with reference to ascertaining what is the legal meaning of the language which is used. After making these provisions as to the Flemings marrying his daughters, and after making the provisions, which your Lordships will recollect, naming the third daughter as if she was the second daughter, and the second as if she was the third, he proceeds to notice the case of the four younger sons of the Flemings, the elder not succeeding under the limitation, by not observing the conditions, and then he says, ‘ Thaine, and in ather of these ‘ caices, we have designet, nominate, and appoynted, and by this ‘ pntts, designes, nominattes, and appointes.’ Now, I beg your Lordships attention to these words, ‘ the immediat next eldest lawll ‘ sonnes,’ in the plural number, ‘ of the saides Johne Lord Fleming ‘ and Dame Jeane Drummond his Lady, being immediatlie next in ‘ birthe to their eldest sone, and are ilk ane of them, *successive* after ‘ uyres, to be the persounes wha sall succeed to us in our said estate, ‘ landes, baronnies, and uyres above spect, they always mareing and ‘ taking to yr lawll spouses the eldest lawll dochter of the said Lord ‘ Ker, our sonne, being on lyffe, and unmarried for the tyme, and ‘ they and yr airis-maill forsaide of the said marriage keepand, per- ‘ formand, and fulfilland the haill remanent conditiones of this last ‘ nomination.’

“ My Lords, The words which I have read to your Lordships constitute a description of persons which must admit of construction, because they require construction. It is absolutely impossible to give them the effect they have in common parlance, this is to ‘ the ‘ immediat next eldest lawll sonnes of the saidis Johne Lord Fleming ‘ yng and Dame Jeane Drummond, his Ladie, being immediatlie ‘ next in birthe to their eldest sonne.’ Why, a sixth son, in the language of common parlance, could not be said to be next in birth to their eldest son ; but he might become next in birth to their eldest son by the failure of his intermediate brothers ; and these words,

at the moment of the execution of this deed, might describe one person, and at the time that they would be to be acted upon as a limitation taking effect, they might describe an entirely different person; and this shows therefore that you must get at the meaning of the words, by construing each word with reference to every other word, and by construing the whole with reference to the context in which the words occur, 'they always marrying and taking to yr lawfull spouse the eldest lawfull dochter of the said Lord Ker, our sonne.' Now the eldest daughter of Lord Ker, in common parlance, would mean Lady Jane Ker; but that the eldest daughter of the said Lord Ker, or son, may mean at one time Lady Jane Ker, under the effect of his instrument, at another time Lady Margaret Ker, and at another Lady Anna Ker, is clear by the words which follow here, which are, 'being on lyffe and unmarried for the tyme;' and the question, therefore, under any other instrument would be, whether the words, 'eldest lawfull dochter of the said Lord Ker,' being proved in this context to be words not necessarily, and in every point and period of time describing the same ascertained individual, the question in every other conveyance would be, whether there are words in it to show that the terms, 'eldest lawful daughter of Lord Ker,' would necessarily mean a class of persons, taking them together with the context, as clearly as the words, 'being on lyffe and unmarried for the tyme,' prove such a meaning; for there is no contending that those are the only words in the language capable of giving such a construction to the words which precede them.

"So again, my Lords, it is necessary to ascertain the construction to be given to the words in this clause, 'their airis-maill,' and 'thir airis-maill foresaid of the said mareedge, keipand, performand, and fulfilland, the haill remanent conditionnes of the pnt nominationun.' Now it is stated as a proposition generally true, as it undoubtedly is, that the words heirs-male do not mean heirs-male of the body; I mean do not mean heirs-male of the body in Scotland;—still, if they are heirs-male of the marriage, they may mean heirs-male of the body: and if the question were to arise therefore upon this instrument, I am satisfied that your Lordships could be driven by no precedent necessarily to say, that these words, 'heirs-male,' meant heirs-male, not merely of the body, but heirs-male generally, when the author of this deed has said that they mean heirs-male of the marriage.

"Then follow these words: 'And falzeing of all the before-namit persons, be deceis or not-performance of the foresd conditionnes; in that cause we have designit, and, be thir pntts, designes the said Lady Jeane, Margaret, Anna, and Sophia Kers, our oyes, and falzing of the first, the next immediate eldest of the sds dochters successive after uyes, and yr airis-maill lawlie to be gottine of r bodies, to be the personne wha sall succeed to us in our sds andes, barronnies, erledom, and uyes above wrn.' Here, your

1810.

 KER, &c.
 v.
 INNES, &c.

1810.

KER, &c.
v.
INNES, &c.

Lordships observe, is an express limitation, that the daughters are to take *successivè*; and I mark that as I go along, because the insertion of such an express limitation in this instrument (1644), and of such a limitation as that which is to be found in the deed of 1648, are the two facts which must be put together, when you come to reason what is the effect of that obscure passage in the subsequent deed of 1648; but I cannot pass this over without saying, that if the word *successivè* had not stood part of this sentence, I should have held it indisputably clear, that the meaning was exactly the same: for if it had stood, 'and falzeing of the first, the next immediate eldest of the sds dochters after uyres, and yr airis-maill lawlie to be gottine of yr bodies, to be the personne wha sall succeed to us in our sds landes, baronnies, erledom, and uyres above wrn,' I think it must have been indisputably clear, that that would have created a succession without the word *successivè*. And I have to call your Lordships attention here to the singular word '*personne*;' for it cannot be doubted, that that word, in the consideration of what might be the necessary actual application of it, when an application of it was called for, with reference to a person to succeed, might be applied to a person at that time, to whom it would not be applicable at the time the instrument speaks, that is, at the time of its execution, as describing a person who, in a future event, might be the person to whom only it could be applied, and to whom, therefore, necessarily it must be applied.

"My Lords, This goes on to say, 'they always mareing, and taking to yr lawll spouss, ane gentilman of the name of Ker, of lawll and honoll descent.' Your Lordships observe that as the singular term person, in the former part, must mean persona, so the plural term here must mean they and each of them. It must be singular and plural. 'They always mareing and taking to yr lawll spouss ane gentilman of the name of Ker, of lawll and honoll descent; and yr sds husband and yr airis forsds, taking, keiping, and retaining the said surname of Ker and arms of the sd Hous of Roxburghe allenarlie, in all time yrafter; as also performing the remanent conditiones of this pntt nomination: and falzeing also of all the sds personnes, be deceis or not-performance, as sd is; in that case, we have designit, and, by thir pntts, designes and ap-poyntes our nearest and lawll air-maill qtsumever, being ane gentilman of the name of Ker, of lawll and honoll descent, and the heir-maill lawlie to be gottine of his body.' Your Lordships will permit me to observe, that here the Ladies were required to take a gentleman of the name of Ker in marriage. That was not the case in the deed of 1648. The person who was to take under this last limitation was to be a gentleman of the name of Ker, entitled, as I understand, lawfully entitled to the name of Ker, of lawful and honourable descent, which is not the case in the deed of 1648.

"Then, my Lords, there is another clause, which it is necessary

also to call your Lordships attention to, and that is a clause with reference to the portions. "In caise it sall happine, the said Sir William Drummond, or any others of the persons either particularie or generally before namit, and their airis-maill forsd lawlie to be gottine of yr bodies, being married as sd is, or ony of them, to succeid to us in the said estate and living, be virtue of thir potts, that thane and in that caise, the samyne persone sua succeeding, and their spouses," (There the word person clearly must mean, not an individual who could be described at that time, but individuals who were to succeed one after another, and who might therefore be said, though described by a singular term, with great propriety to be a person who might have their spouses), 'to be joyned in mareadge with them; and their airis-maill forsades sall be baldine and obleist to content and pay to the remanent dochteris before namitt of the said umql Hary Lord Ker, the several soumes of money after spectt, ilk ane of them for yr awne pairts, as is after dirydit; give thaire be only ane of them, to content and pay to the said dochter the soume of forty thousand merkis, usual money of this realme; and give there be only twa of them on lyffe, to content and pay to the eldest the soume of threttie thousand merkis,' (Your Lordships will recollect these portions are enlarged in the deed of 1648), 'and to the youngest, the soume of twenty-five thousand merkis, money foirsaid; and give they be all thrie on lyffe, to content and pay to the eldest the soume of threttie thousand merkis, usual money forsd; to the second, the soume of twenty-five thousand merkis, money foresaid; and to the youngest, the soume of twenty-five thousand merkis, money foresaid; and that sua soon as they sall be of the age of sexteine years: Providing that, in caise it sall happine that any of the sdes dochteris,' (which might be one of them; for though there were three, that might describe either two or one,) 'to depart this lyffe befor they be of the age forsd.' (Now, if one daughter died, you would be obliged to construe that word as if it were she; and if two daughters died, you would be obliged to construe any of the said daughters as meaning either of the said daughters. That is another passage that tends to shew, that a plural word is sometimes used, which must be applied to a single person), 'or zitt before they be married; in that caise,' (This I would also draw your Lordships attention to), 'the portioun of the sd dochter sua deceisand sall return to our sd air, and nawayes fall to the rest of the sdes sisteris, yr airis nor exers.' Now there also the singular term portion, and the singular term daughter, might, by events, be necessarily construed to mean portions and daughters; and the plural term sisters, their heirs and successors, might, by the course of events, be made to define one and one only.

"My Lords, I have nothing further to observe upon this, except calling your Lordships attention again, in a short word, to that which

1810.

KER, &c.
v.
INNES, &c.

1810. I have termed the power of revocation, and which is in these words: 'But prejudyce always to us, at any time during our lyffe
 KER, &c. 'time, to discharge, reforme, alter, or renew thir pntts as we sall think
 v. 'expedient.'
 INNES, &c.

"My Lords, the next instrument which it is necessary to take notice of in the course of these transactions, is the charter in 1646. and that charter, it is necessary to observe upon. The lands were granted to him, and to the heirs male of his body, with remainder: 'heredibus suis vel assignatis quibuscunque, in ejus optione, designationis, nominandis, vel constituendis per ipsum, aliquo tempore in vita sua, vel ante ejus decessum, per assignationem, designationem, nominationem, seu declarationem, sub sua subscriptione.' From this I infer, that as early as 1646, and therefore earlier than 1648, the Earl had made up his mind, that the regulating instrument of his title should not be that deed of 1646, because your Lordships observe, that he alludes clearly to some instrument thereafter to be executed.

"My Lords, In 1648, he executed that deed or charter upon which the controversy has principally turned at your Lordships Bar: and it is necessary, in order that this case may be fully understood, and with clearness, to lay before you the principles which govern the judgment of the individual who addresses your Lordships, first to state the effect of that charter.—The person first called is the same Sir William Drummond, as 'youngest lawful sone to Johnne Earl of Perth, and the aires maill lawfully to be gottine of his body, with his spouse after mentionat.' Here, my Lords, is the first alteration to which it will be necessary for your Lordships to advert, that the heirs-male of Sir William Drummond who are to take under the deed of 1648, were to be the heirs-male of the body of Sir William by his spouse after mentioned, which is repeatedly after mentioned; and it is material to notice that, because it has been intimated, that under the deed of 1644 there might be heirs-male of Sir William Drummond who might take, who would not necessarily be his heirs-male by any of the daughters of Mary Lord Ker. Perhaps that will admit of more doubt than seems to have been thought to belong to that question; but under this deed of 1648, that no other heirs-male could take under the effect of this limitation, is abundantly clear. He proceeds then to limit the estates to the second lawful son of John Lord Fleming and Dame Jean Drummond, his Lady, and the heirs-male of his body; then to the third son, and then to the fourth lawful son of John Lord Fleming and his Lady. And here your Lordships will allow me to call your attention to the manner in which he calls, in this tailzie, the younger Flemings: 'I nominate, declare, and constitute the next immediate eldest lawful sons of the said John Lord Fleming, procreate or to be procreate betwixt him and the said Dame Jeane Drummond, his Lady, and the aires-male

‘lawfully to be gotten of their bodies with their spouses *respective*
‘after nominate.’

1810.

“Now, my Lords, although it be perfectly clear, that the institute here mentioned, as the youngest lawful son of John Earl of Perth, could not, by any possibility, mean any person but Sir William Drummond, because it is a description of Sir William Drummond, he being also described, *eo nomine*, Sir William Drummond, and that the second lawful son of Lord Fleming could mean no body but Robert Fleming, for the same reason, because he is named, and so that the third and the fourth lawful son could mean only those individuals who are named by their Christian and surnames; yet, my Lords, would it be difficult or impossible to say, that where such a general term, as the next immediate eldest lawful sons, is found, and which is not limited in its construction by the actual use of those words which constitute name and surname, and where the purpose was to create a succession, that that term could mean others than the fifth son, and that it did mean the sixth, seventh, eighth, ninth, or tenth? Here construction is not only admissible, but no effect whatever can be given to the deed, unless you do admit it, because this is without a single word expressive of the idea of succession; this is a limitation to the next immediate eldest lawful sons of the said John Lord Fleming, to the whole of them described as sons by the plural term, and to the heirs-male lawfully to be begotten of their bodies. I presume it cannot be contended, that that was a limitation under which all four of these sons could take at once shares descendible to the heirs-male of their bodies lawfully begotten. Why, then, if all the sons are not so to take, how can they take unless *successive*: and if they take *successive*, by what term are they so to take, there being no such term as *successive* in the instrument, unless it is by virtue of these terms which form the whole description? the meaning of the whole being put together, and that meaning being collected from the context, and the whole of the context in which those words occur. These therefore are extremely material words in this deed of 1648, as shewing what it is that the author of this deed of 1648 means, when he connects plural terms with singular terms, and singular terms with plural terms. It cannot be denied, I presume, that you may, from the construction of each and every word, see what is the proper construction to be put upon the whole of the words.

KER, &c.
v.
INNES, &c.

“There then follows this clause, to which I would call your Lordships attention: ‘And also providing, that the said Sir William Drummond, and failing of him by decease, or in case of his marriage, or not observing of the conditions above and after mentioned, the next person,’ in the singular number, ‘havand right for the time to succeed.’ I call your Lordships attention to the words ‘to succeed.’ Here is *person* in the singular number connected with the idea of succession, as expressed in the terms ‘havand right for the

1810.

KER, & CO.

v.

INNES, & CO.

'time to succeed, as said is, sall marry and take,' to what? to his lawful spouse? No: it is 'sall marry and take to *their* lawful spouse.' Then, my Lords, I say, if you were to ask me at the time this instrument is executed, who is the next person having a right for the time to succeed, I should reply, that it is the person named in the settlement who is next to succeed; but if you ask me who that means at the time a former substitution fails, that person who was next to succeed at the time of the execution of the deed might not be the person who was then next to succeed; and the question is, Whether it is not matter of necessary construction, in order to carry into effect the conditions and restrictions of the deed, that you should say that the singular term, the next person is meant to describe a plurality of persons taking certainly individually when they do take, but a plurality of persons under a singular phrase, and is not that demonstrated by the plural pronoun *their*, as coupled with these words, the next person and their spouses?

"My Lords, I know it has been said, the meaning would have been exactly the same, if it had been the next person, and his spouse: the meaning would have been the same; but still the singular term, *the next person*, and the singular term, *his*, would have described, in two events, very different persons. They, therefore, would be terms apt enough to describe more persons than one, according as they were used in their connection: the individual who was to be taken to be their lawful spouse, was Lady Jane Ker, eldest daughter of Hary Lord Ker. I press upon your Lordships attention this phrase, to satisfy the parties, that you have not forgotten, that a great deal of stress was laid upon this expression; that in this very deed, upon which has arisen this discussion, Lady Jane Ker is expressly described as being the eldest lawful daughter of Hary Lord Ker, Lady Anna Ker is here stated to be the second daughter of Hary Lord Ker, who, in the deed of 1644, had been stated to be third daughter of Robert, and Lady Margaret is put in her proper place.

"There then follows a clause, upon which a great deal of argument has been used, as to taking the name of Ker, and bearing the arms of Roxburghe: 'In caice of failzie, or that they refuis or forbere to assume and tak upon them the said surname of Ker, and carry and bear the said arms of the house of Roxburghe, in that caice the person failzien, and the airis of thair body, sall amit and tyne the benefit of the tailzie and succession.' There is another part to which I would call your Lordships attention. 'In that caice, the person or air of tailzie sua failzien,'—but that I may pass over; and that brings me to the particular clause in this instrument upon which the question mainly arises: 'And qlkis all failzieing be decease, or be not observing of the provisions, restrictions, and conditions above written, the right of the said estate,' in reference to which, as your Lordships know, there is a great deal of con-



test, whether it will pass the dignities, as well as the lands, 'the
 ' right of the said estate, sall pertain and belong to the eldest doch-
 ' ter of the said Hary Lord Ker, without division, and yr heirs-male,
 ' she always maring or being married to ane gentilman of honorable
 ' and lawful descent, wha sall perform the conditions above and
 ' under-written;' and then follow these words: 'Ql'kis all fail-
 ' ings, and yr sds airis-male, to our nearest and lawful airis-male
 ' qtsomever.'

1810.

KER, &c.
 v.
 INNES, &c.

" My Lords, The question between these parties arises principally upon this clause. Sir James Innes Ker says, that these words, 'the eldest daughter of Hary Lord Ker, without division, and their heirs-male,' mean the daughters in succession; and that as Margaret, on the failure of the former daughter, became, in a sense, eldest daughter, he, descending from her, as the heir-male of her body, is entitled to these estates and these dignities. He contends further, that the words their heirs-male do not mean heirs-male whatsoever, or heirs-male in the general sense, but that the context shews that they mean heirs-male of the body. On the other hand, Colonel Walter Ker insists, that these words, eldest daughter, are descriptive of Lady Jean Ker, described, in the former part of the deed, as eldest lawful daughter of Hary Lord Ker: and he further contends, that the words, their heirs-male, do not mean heirs-male of the body, but heirs-male generally; and that therefore, whether this created an estate in the eldest daughter only, or created an estate to be taken by the successive daughters, yet no third daughter can take in preference to the first and second, until heirs-male general of the first and second have failed, and he states himself to be the heir-male general of Lady Jean Ker, as well as the heir-male general of Robert the first Earl of Roxburghe, and of Hary Lord Ker; and that therefore, upon that construction, he is entitled to succeed as such.

" Mr. Bellenden Ker, on the other hand, cannot agree with either of them. He says, together with Colonel Walter Ker, that eldest daughter means Lady Jean Ker; but he says, together with Sir James Innes Ker, that heirs-male does not mean heirs-male generally, but heirs-male of the body; so that, upon one point, he contends with Sir James Innes Ker, and on the other point, with Colonel Walter Ker. My Lords, It is further insisted, upon the part of Mr. John Bellenden Ker, as against both these other competitors, that this clause really is not a clause which creates heirs of tailzie; they call it in the argument a devolution-clause, a clause of return, and a great variety of other names: but Mr. John Bellenden Ker insists, that the individuals here described, however the description may suit, are not individuals whose rights and interests are protected as heirs of tailzie.

" I would now call your Lordships' attention to the words, 'ql'kis all failings, and yr sds aires-male;' there are two constructions which

1810. have been put upon these words. Upon the part of Sir James Innes Ker, it is contended, that the words, 'q'lkis all failzeing, and yr ads 'aires-maill,' mean, all which daughters failing, and their heirs-male.

KER, &c.
v.
INNES, &c.

On the other hand, it has been contended by other parties, that that is not so; that 'which all failing' does not mean, which daughters all failing, but which substitutes all failing; and that if the eldest daughter, or other daughters, and their heirs-male have failed, that lets in the claim of lawful heirs male whatsoever.

Construction
of the words
used in the old
Retours.

"My Lords, Before I part with this, your Lordships will give me leave to remark, that we have had a great deal of argument upon the Latin translation. Now I think I do not presume too much when I say, that I should think the Court of Session in Scotland were just as good interpreters of these Scotch words as the Latin translator of a charter; and that to put it at the highest, you can only look at his translation as a judicial opinion what those Scotch words meant. In the first retour, as I understand the case, the word *thair*, which stands in the original, is construed *earum*. If that be a right construction, *earum* must, of necessity, mean the heirs of the daughters. *Ejus* could not describe daughters; *earum* could not describe males: therefore, if the translator is right in making it *earum*, his opinion is, that the words, their heirs-male, mean the heirs male of females, and of more than one female; but if we are to take the authority of the same translator, and put him upon the Bench in the Court of Session for this purpose, when he came to construe the words, which all failing, and their said heirs-male, he construes this word, not *earum*, but *eorum*. Now it is impossible that that can mean the daughters: it may mean the daughters and their heirs-male, because *eorum*, which is a masculine term, may include both, or it may mean all the former substitutes and their heirs-male. My Lords, in some other of the instruments, which we see afterwards, you find this word is construed by the word *ejus*, which I think would make no great difference; but this word *thair* has, in point of fact, admitted of all these different translations, which are just so many constructions put by the men of business of the parties upon the instrument now before your Lordships.

Observation
as to "Heirs-
male."

"My Lords, I cannot part with this, without another observation, with respect to those who contend, that these words, 'which all failing, and their said heirs-male,' mean, not the heirs-male of all the daughters, but the heirs-male of all the substitutes. It is impossible for them, consistently with that, to contend, that heirs-male may not mean heirs-male of the body, because the heirs-male of the former substitutes are all heirs-male of the body; and therefore, when they construe these words, they must say, that as far as they are applicable to the former substitutes, they mean heirs-male of the body; and that as far as they are applicable to heirs of the daughters, they mean heirs-male generally; and if they do that, they ad-

t, that heirs-male is a flexible term, and may mean both heirs-
le generally and heirs-male of the body.

" Your Lordships will permit me now to point out that clause in
ich the portions are given. I should first have stated to you a
use, by which he obliges himself and his heirs-male to denude
mselves of what have been called the estates acquired, and to
vey those estates acquired to his heirs of tailzie, and the heirs of
ir bodies lawfully begotten. I mark the passage with respect to
: portions, because it will require some particular observation.
is in these words: ' And in like manner it is specially provided,
e express condition hereof, that in case it sall happen the said Sir
William Drummond, or any otheris, our airis of taillie and provi-
ion specially or generally before mentionat, or any of them, to
ucceed to us in the said estate and living, be vertue of thir pnts,
hat thane and in that caise the samyne persone' in the singular
umber ' sua succeeding, and yr spouses to be joined in marreadge
with ym, and yr aires-maill aforesaid, sall be haldine and obleist to
content and pay to the remanent dochteris' certain sums. This is
another passage in which your Lordships see plural words are con-
ected with singular words, and so connected with singular words as
o prove that singular words merely may mean a class of persons;
or these words imply a plurality of persons. I would shortly ob-
serve to your Lordships, that the portions are enlarged by this deed ;
and then there are several other passages which afford some obser-
vation, but which I cannot state to your Lordships to be observation
material enough to justify me in taking up your Lordships' time, by
stating the remaining part of this deed.

" My Lords, Having now proceeded to detail to your Lordships
the effect of this settlement of 1648, and recollecting that it is my
duty to pay attention to the convenience of the House, instead of
asking the attention of the House to my convenience, I would in
this stage of the business, if your Lordships would give me leave,
adjourn the continuation of this matter until the rest of the business
of the House is concluded ; meaning when that is concluded, if your
Lordships will give leave, to proceed further to-night, if there should
be time. If, on the other hand, that business should detain your
Lordships too long to admit of such proceeding to-night, I then pro-
pose to resume the discussion of it at an early hour to-morrow."

Second Day.

Friday, 16th June 1809.

" My Lords,

" I proceeded, with your Lordships' indulgence, in the course of
yesterday, to the extent of stating to your Lordships the contents,
with some observations upon them, of the deed of 1648, with the
history of the transactions in this case to that period. I now resume

1810.

KER, &c.

INNES, &c.

1810.

KEE, &c.
v.
INNES, &c.

the consideration of the subject, after stating to your Lordships, what it has since occurred to me I forgot yesterday, a passage in the deed executed by Robert Earl of Roxburghe in 1643, which is a passage material to be pointed out to your attention, because it shows, that at a period so early as that, (and indeed many instruments of an earlier period shew it), there was a known distinction, generally speaking, between the description of heirs-male of the body of a person, and a person's heirs-male. The passage to which I allude is the obligatory clause in the deed of the 7th of November 1643, where the Earl states, ' Therefoir wit ye us to be bund and obleist, ' likeas we, be thir presents, binds and obleises us and our airis- ' male, als weil gottin of our awin bodie, as our airis-male, taillie, ' and provisione whatsumever, to ratify and approve the particular ' letters of prory of resignatioun rexive above spect, maid be us, for ' resignatioun of the lands, baronies, and utheris *respectively* above ' written, of the daitts and contents above mentionat, in all and ' sundry heids and conditions thereof, and binds and obleises us, and ' our saids heirs-male, als weil gottin of our awin bodie, as airis- ' male, tailzie, and provision whatsomever, to renew the samen ' prories in favor of the saidis airis-male to be gottin of our bodie, ' and the airis of taillie specified in the saidis prories of resignation, ' after the forms and tenors thereof.' I need not detain your Lordships by reading other passages in the same instrument, in which the same form of expression and description of heirs occurs.

" My Lords, I would take notice now, that the clause beginning with the words ' eldest daughter and their heirs-male,' in the deed 1648, appears to have been written, as your Lordships have been informed by the fac-simile, which has been laid upon the table, in a blank, which has been supposed to be too small for a clause of substitution of the four daughters, expressed in the same manner as that clause of substitution which appears in the deed of 1644, with reference to which, therefore, it has been conjectured, that Mr. Learmont and Mr. Don, whose names have frequently occurred in these discussions, were trying which could be the best abridger, and who could put the most of the *multum in parvo*. As to this, it is enough for me to say, and I shall trouble your Lordships no further, that I cannot conceive a more dangerous principle to be introduced into judicial construction, than that of giving yourselves permission to suppose that you can judicially construe an instrument with regard to such a circumstance. Indeed in this case, without entering into general considerations, every inference that could be drawn from the circumstance of the vacuity in the parchment being so small, would be done away by what appears in the margin, by an insertion in the margin. I am almost afraid to state such an observation as that: because, if we are to be considering, with reference to any deed what we are to allow to the difficulty of writing large or writin small, in a blank in parchment to be filled up, and to be attendir to the more or less of difficulty that belongs to the compressing

ger or a smaller quantity of words into a blank, it appears to me, give ourselves a liberty which, in judicial matters, it would be the most dangerous thing in the world to take. But as to that deed of 1648, this is a circumstance worthy of no judicial consideration whatever, when you see a marginal insertion.

“ My Lords, I will now point out to your Lordships the fact, that there was a parliamentary ratification of the charter of 1646, and of the infeftment of 1648; the effect of which parliamentary ratification, your Lordships will recollect, has been discussed a good deal in the Committee of Privileges. It is not necessary to consider it with reference to the estates, and therefore I do not trouble your Lordships with any further observation upon it at this moment.

“ My Lords, It appears that the Earl of Roxburghe died in the year 1650. Sir William Drummond, who was the institute in the charter of 1648, made up titles to him by service, as heir of tailzie and provision; and if we could look satisfactorily at instruments which could be stated to be the most contemporaneous with the deed of 1648, and if we could look at those instruments as containing any thing of judicial authority, merely because they happened to be translations of a Scotch deed into Latin, your Lordships would find the word *earum* is probably the oldest and the most contemporaneous construction put upon the words in this clause, ‘ their’ heirs-male; and yet your Lordships will permit me to say, you should not be too certain of that, because I have seen *earum* upon parchment, where I could not be quite sure that it stood so originally.

“ My Lords, Upon the death of Robert Earl of Roxburghe, Sir William Drummond made up titles, and Sir William Drummond certainly seems to have been reasonably attentive to the invitation given him to marry Lady Jean Ker; for he does, in compliance with the injunctions of the entail, in 1655 marry that Lady, and to give still greater validity to his title, as it is stated, he obtained a decree of adjudication in implement on the bond granted by Earl Robert in 1643.

“ In 1655, your Lordships will recollect, that a bond of marriage was executed between this Sir William Drummond and Lady Jean Ker, and which contains expressions and provisions, to which it is necessary to request your Lordships’ attention. It is executed, your Lordships know, upon the 17th, or some other day in May 1655. It is appointit, contractit, and finally agreit, betwix the honorable parties undernamit; to wit, betwix ane Noble Earl, William now Earl of Roxburghe, Lord Ker of Cessford and Cavertoun, on the one pairt, and Lady Jean Ker, eldest lawful dochter to the deceist Harie Lord Ker, with advyce and consent of her honorable friends and curators under subscribing, and of ane Noble Countess, Dame Margaret Hay Countess of Cassills, her mother, and of ane Noble Earl, John Earl of Cassills, Lord Kennedie, her spouse, for their interest, on the other pairt, in manner, form, and effect, as after

1810.

 KER, &c.
v.
INNES, &c.

1810. ' follows.' It then recites this charter of the 23d of February 1648 pretty much at length : it recites the intended marriage ; and then, in this deed, there are the following provisions. ' It is alwise here-
 KER, &c. ' by provided, that in case there shall happen to be a son of the
 v. ' marriage betwixt the said Noble Erle and the said Lady Jean Ker,
 INNES, &c. ' to succeed to the estate of Roxburghe, and living during the lyfe-
 ' times of the said Countess of Cassillis and Countess of Roxburghe
 ' *respectivè* living both together ; and failing of a son of the said mar-
 ' riage, in case any other of the said deceased Harie Lord Ker's three
 ' dochters, viz. Lady Anna, Lady Margaret, or Lady Sophia Kers,
 ' sall happen to be Countess of Roxburghe, *by marrying of any of*
 ' *the rest of the aires of taillie* who sall succeed to the said estate ; in
 ' these, and ather of these cases, during the joint lyfetemes allenarlie
 ' of the said two Countesses of Cassillis and Roxburghe together,
 ' the said Lady Jean Ker sall be seclud, and her liferent-infetment
 ' sall be suspended, in so far as concerns the foresaid lands of West
 ' Sprouston and teinds thereof, and als many of the rents and lands
 ' of Broxmouth and Pinkertons, and other lands and teinds, lying
 ' within the said parochin of Dunbar, in her option always what
 ' pairt of the saids lands and teins within the said parochin of
 ' Dunbar she shall be secludit fra, as will extend to 5000 merks
 ' yearlie during the space of the foresaid suspension :—with this
 ' provision always, that there being a son of this present marriage,
 ' or that any of the saids uther three sisters above namit sall be
 ' Countess of Roxburghe, as said is, that then and in that case, the
 ' said Lady Jean sall be seclud from her lyferent of the saids
 ' lands and teinds of West Sprouston, in ather of the saids cases,
 ' als well after the deceis of both the saids Countesses of Cassillis
 ' and Roxburghe as during their lyfetemes ; so that the said Ladie
 ' Jean sall have no right nor possession of the saids lands and
 ' teinds of West Sprouston, if ather there sall be a son of the said
 ' marriage, or if any of the rest of her said three sisters shall be
 ' Countess of Roxburghe by marriage, as said is.'

" My Lords, I presume to notice to you these passages, that it may be seen that we have not forgotten what was the course of the argument founded upon this contract of marriage. It was reasoned upon as furnishing this inference, (and I here take leave to observe, that the counsel on both sides have found it extremely difficult to restrain themselves within the boundaries of those principles of law which have been laid down, that you are not to construe one deed by another) ; but it has, in point of fact, been reasoned, that this is an instrument which tends to shew, that in this year 1655, when this contract of marriage was entered into, the parties to this contract of marriage did not entertain any notion that the three younger sisters could be Countesses of Roxburghe, except by marriage ; from which it has been inferred, that therefore they could not be Countesses of Roxburghe by the effect of that limitation to the eldest

ughter and their heirs-male, which is contained in the deed of 1648. Now, to be sure, it would have been very easy, if you had about executing a marriage-contract like this of 1655, with reference to every event that might have happened, to have provided for every such event. Lady Jean Ker, your Lordships recollect, and when one is to consider what belongs to an argument founded on the notion, that these four daughters were the *dilectæ personæ*, is worthy of observation, that Lady Jean Ker, when she married Sir William Drummond, was not herself, if I understand this instrument of 1648, to be considered as owner of the estate, but Sir William Drummond was to be considered as owner of the estate; and if Lady Jean Ker had died, Sir William Drummond would still have continued owner of the estate, with respect to himself and the heirs-male of his body. But put the case the other way; suppose Lady Jean Ker had married Sir William Drummond, and Sir William Drummond had died without heirs of the marriage, does it appear to have been of necessity, that any of the three others, by marrying the other parties, whose connection with them in marriage was looked to, would have been Countesses of Roxburghe. For unless there was some objection in point of consanguinity known to the Scotch law, which I am not at present aware of, but which there might be; unless it is an absolute certainty, that no Scotch Lady takes a second husband; I have no idea that Lady Jean might not have another husband in a Fleming, and be Countess of Roxburghe by reason of that second marriage, as well as by the first. If the Flemings were so connected with her in consanguinity, that they could not be connected with her after her first marriage, the contrary of that is true.

"There is another observation which has been made, that because the author of this deed thought the other three could be Countesses of Roxburghe only by marriage, they, *ex necessitate*, thought they could be such only by marriage with the Flemings; but there is also a clause in the deed as to the marrying some other person of lawful and honourable descent. There is a third observation to be made upon this deed, that if you can look at it as evidence, it is but evidence; and looking at it as evidence, being but evidence, it amounts to nothing more than the construction which the individual parties to this deed may be said to have put upon the charter of 1648; and they thought it possible that one of those other persons might become Countess of Roxburghe;—they thought it, in the first place, likely the Flemings might not disregard the invitation to a matrimonial connection, which this deed of 1648 held out to them; and they did not look at all the events, or through all the contingencies that might happen, to which the deed of 1648 might apply. If it can be admitted as evidence, it is an instrument which your Lordships undoubtedly, in that view of the subject, ought to consider when you take a full view of the whole subject before you; and it

1810.

KER, &c.
v.
INNES, &c.

1810. is for that reason I have taken the liberty to call your Lordships' attention thus particularly to it.
- KER, &c.
v.
INNES, &c. " My Lords, There was another parliamentary ratification, which your Lordships will recollect, followed this deed of nomination in 1648, which I think was procured in the year 1661; and it is material also to take notice of another deed, which was a deed of ratification by Sir Walter Ker of Fawdonside, who had at that time become the heir-male of the Kers of Cessfurd, and consequently heir under the ancient investiture. That parliamentary ratification and that ratification by Sir Walter Ker, will be more material to be considered certainly, in the question upon the dignities, than those are with reference to the contest relative to the estates.
- " My Lords, This William second Earl of Roxburghe had two sons by his marriage with Lady Jean Ker; Robert, who succeeded him in 1665, and John, who was afterwards Lord Bellendune. Robert, the third Earl of Roxburghe, is stated to have been succeeded by his sons Robert and John, fourth and fifth Earls of Roxburghe; and all these heirs of entail are stated to have completed their feudal titles to the estates, in the terms of the deed of 1648.
- " In 1707, John, who was the fifth Earl of Roxburghe, obtained a patent from the then Queen, (Queen Anne), which your Lordships have printed at length in the appendix to Colonel Walter Ker's case. It is No. 13. in that appendix; and by that deed her Majesty states, ' Facimus, constituimus, creamus, et inauguramus, eundem Joannem Comitem de Roxburghe, Ducem de Roxburghe, Marcionem de Beaumont et Cessfurd, Comitem de Kelso, Vicecomitem de Broxmouth, et Dominum Ker de Cessfurd et Cavertoun; dando, concedendo, et conferendo, sicuti nos, per præsentes, damus, concedimus, et conferimus, in dict. Joannem Comitem de Roxburghe, ejusque hæredes masculos de suo corpore, quibus deficientibus, ali- quos hæredes, titulo et dignitate Comites de Roxburghe, per priora diplomata prædecessoribus dict. Joannis Comitis de Roxburghe catenus fact. et concess. succedere destinat. dictum titulum, honorem, ordinem, gradum, et dignitatem Ducis.' So that these honours were given to him and the heirs-male of his body, with remainder to the heirs of the title to the Earldom of Roxburghe: and, without going further in matter of observation as to the dignities at present, upon this instrument of 1707, I would just observe to your Lordships, that if it can be made out, that the deed of 1648 did not pass the dignities, or if it can be made out that if the deed of 1648 was intended to pass the dignities, yet, by reason of the mode and manner in which the charter was executed, I mean with reference to the sign-manual and the cachet, it did not pass the dignity of Earl of Roxburghe; or if it can be made out, that supposing that deed was not effectual to pass the dignity of Earl of Roxburghe, the parliamentary and other ratifications of this charter are upon any grounds not sufficient to give

y to the charter of 1648 ; it will fall to be considered, with ice to this patent of 1707, upon whom the titles granted by tent of 1707 will actually devolve, not with reference merely intention of her Majesty who granted those letters patent of but with regard to the question of law and fact, who is at this at entitled to the Earldom of Roxburghe ?

y Lords, In the year 1729, John the first Duke of Roxburghe ed a disposition of his estates. He proceeds, in that disposi- upon the narrative of the deed of nomination and the entail of and he disposes these estates to Robert Marquis of Beau- his only son, and the heirs-male lawfully to be procreated of dy ; which failing, to the other heirs of tailzie substituted to contained in the tailzie made by the deceased Earl of Rox- e, his great-grandfather's father, and in his infeftments there- *all which heirs of tailzie are held as therein insert and express-* which failing, to him, his heirs and assignees whatsoever. My , I do not at this moment correctly recollect, whether, in harter of 1729, when the eldest daughter of Hary Lord Ker is oned, she is mentioned with the addition of *her* heirs-male.

n 1740, the Duke of Roxburghe executed another deed of en- certain lands, but in like manner ; and they are disposed ' to on Robert Marquis of Beaumont, and the other heirs-male of own body, and to his brother-german Lieutenant-General liam Ker, and the heirs-male of his body ; whom failing, to other heirs of tailzie substituted to them, contained in the said il of the said estate of Roxburghe, made and granted by the deceased Earl, his great-grandfather's father, and in the infeft- ts following thereupon ; *all which heirs of tailzie are held as in insert and expressed.*' And here, without answering for a t memory upon the subject, your Lordships will be pleased to se, (be the fact as it may), that the limitation is to the eldest ter of Hary Lord Ker, and her heirs-male.

n 1741, Robert, second Duke of Roxburghe, succeeded to his , and he is stated to have completed his investiture, (I am now g from the case of Colonel Walter Ker), by executing the pro- ries contained in the two last mentioned deeds, and by virtue s, it is represented, that he expeded a charter from the Crown our of the heirs named in the entail of 1648. The clause in harter contained in the substitution in favour of the eldest ter of Hary Lord Ker is conceived in the following terms: *quibus omnibus deficien. per decessum, aut per non observan-* , seu præstationem, restrictionum et conditionum supra script. dict. status et patrimonii per dict. literas talliæ declaratur, ca- , devolvere, et pertinere ad filiam natu maximam quondam urici Domini Ker, filii Roberti primi Comitiss de Roxburghe, ue divisione, et ad *ejus hæredes* masculos, illa omni modo ob- ta nubere, seu nupta esse, generoso viro præclari et legitimi

1810.

 KER, &c.
 v.
 INNES, &c.

1810. 'stematicis, qui omnes conditiones suprascript. perimplebit; qui
 'omnibus deficientibus, ad præfati quondam Roberti primi Com
 KER, &c. 'de Roxburghe propinquoires et legitimos hæredes masculos qu
 v. 'cunque, et per præsentis providetur et declaratur, quod eadem
 INNES, &c. 'cadent et devolvent conformiter.'

"In the year 1747, Robert, the second Duke of Roxburghe, executed another entail of his whole estates; and in this deed the last contained in the charter of 1741 are disposed by the Duke, with a reservation of his own liferent-right, 'to John Marquis of Beaumont his eldest son, and the heirs-male of his body; which failing, the other heirs-male of his own body; which failing, to the other heirs of tailzie substitute to them by the nomination, designation and tailzie made and granted by the deceased Robert Earl of Roxburghe, my great-grandfather's grandfather, bearing date the 2d of February 1648 years, and by the infeftments following thereupon, (*all which heirs of tailzie are held as herein insert and expressed*); which all failing, to me, my heirs and assignees whatever.' Then, my Lords, follows this clause, which calls for your Lordships' particular attention: 'And failing of them all by death or not observing of the provisions, conditions, and restrictions above written, the right of the said estate was by the said tailzie declared to fall, pertain, and belong to the eldest daughter of Henry La Ker, son to the said deceased Robert Earl of Roxburghe, with her division, and to her heirs-male, she always marrying, or being married to a gentleman of honorable and lawful descent, who should perform the conditions above written; which all failing, and the said heirs-male, to the said deceased Robert Earl of Roxburghe his nearest and lawful heirs-male whatsoever; and it is here provided and declared, that the same shall fall and devolve to them accordingly.'

"My Lords, I have troubled your Lordships, by stating with much of particularity and detail these last charters, concluding with this of 1747, under which a feudal title was made up by special service and infeftment, I think, by John the third Duke of Roxburghe, for the purpose of drawing your Lordships attention to what has been contended in some degree in the Court below, perhaps a greater degree than I am aware of from the information I have received from the papers,—to what has been contended also at your Lordships Bar,—that you are to look at this charter as the present investiture of the estate; and it is therefore argued, that whatever was the effect of the charter of 1648, if the charter of 1648, properly construed, gave to all the daughters *seriatim*, or in any other way which all the daughters could take, and their heirs-male, whatever those words mean, could take; yet this charter limiting to the eldest daughter and her heirs-male, the effect of this charter, and the subsequent possession, is to oust the title altogether of the three younger daughters and their heirs-male, whether these words 'he

male' are to be taken to mean heirs-male of the body, or heirs-male generally. My Lords, I shall offer to your Lordships my humble judgment, that it is impossible to maintain that. The intention of the author of this charter, and all these charters, appears to me to have been declared in the body of the charters to be, not to alter the destination of the entails. There is an express declaration in each and every of them: it is enough that there is an express declaration in the last of them, that all the heirs of tailzie of the deed of 1648 are to be taken as if they were therein inserted. There is therefore an express declaration upon the face of each instrument itself, that it was not the intention of the author of it, that the eldest daughter should take in any other way under those instruments, or that any other interpretation was to be given by them to the charter of 1648 than what belonged to the charter of 1648. I have a considerable inclination of opinion, that if, instead of the plural term '*their*' (although a very weighty term) in the charter of 1648, the singular term '*her*' had been inserted, it might have been so inserted without considerable prejudice to what I shall submit to your Lordships is the true meaning of that deed. I am perfectly clear, that this charter of 1747, (and so of the others), referring thus to the charter of 1648, does in effect maintain it; and though in general you cannot construe one deed by another, yet where one thus expressly refers to another, the other is, as it were, incorporated into it, by the effect of that express reference, and the deed here professing to treat all the heirs of tailzie in the deed of 1648 as if they were therein inserted, you must construe the expressions in the deed of 1747, and in these intermediate instruments between 1648 and 1747, by reference to the charter of 1648. I do not mean to deny, that if you can look at these charters as evidence, (if they can be said to carry about with them the legitimate character of testimony as to the meaning of another deed), they may not be said to amount to some testimony, that you are not to give a plural interpretation to this term in the charter of 1648; but if notwithstanding you shall give them the character of legitimate testimony, you are authorised and required, upon the whole matter, to say that the legitimate meaning of the deed of 1648, in the clause in question, is to embrace a plurality of persons, in that case it appears to me that it is impossible to say that by the effect of this subsequent charter and prescriptive possession, the right of these heirs of tailzie is destroyed, who are to be taken as insert in this subsequent charter.—I shall certainly trouble your Lordships no further in what I have to offer to your consideration upon this point.

" My Lords, I understand the third Duke of Roxburghe died without issue in March 1804, and upon his death, and the consequent failure of the male line of Robert the third Earl of Roxburghe, the succession opened to William Lord Bellenden, the grandson of John Lord Bellenden, second son of William second Earl of Rox-

1810.

KEE, &c.
v.
INNES, &c.

1810.
 KER, &c.
 v.
 INNES, &c.

burghe, and only remaining male descendant of the marriage between Earl William, formerly Sir William Drummond, and Lady Jean Ker, the eldest daughter of Harry Lord Ker. It has been stated to your Lordships as matter of fact, that the line of Flemir had for a considerable time been extinct.

“ This last Duke of Roxburghe executed several instruments (the particular nature of which I do not trouble your Lordships with stating at this moment) previous to his death, which happened on the 22d of October 1805, and which are the instruments aimed at by the actions of reduction. By these instruments, different in their nature and contents,—under the effect of these instruments, Mr Bellenden Ker, (who appears to be a relation of this very honourable family) and his trustees claimed the estates.

“ My Lords, After the death of the Duke of Roxburghe, Colonel Walter Ker, who conceived himself to be entitled, by the failure of the prior substitutes, (and I would here put your Lordships in a short word, in mind, that Colonel Walter Ker insists, that Lady Jane Ker was the only daughter who took under the clause I have so often referred to; and that he farther insists, that the heirs-male of Lady Jane Ker, who are called under that limitation, are heirs-male general), proposed to enter into possession of the estate as heir of tailzie and his intention being resisted, the papers represent to your Lordships that a petition was presented to the Sheriff-depute of Roxburghshire for the purpose of obtaining judicial authority to enforce his claim, and to this petition answers were put in on the part of Mr. Bellenden Ker and the trustees. Whilst these proceedings were going on before the Sheriff, and as it has been represented, before he had pronounced a judgment, a petition was presented to the Court of Session by Sir James Norcliffe Innes, in which he stated, that he was the heir-male of the body of his great-grandmother Lady Margaret, the third daughter of Harry Lord Ker; that he was in the character entitled to succeed to the honours and the estates of the family; and he founded his title on the clause of destination in the entail of 1648, in favour of the heirs-male of the eldest daughter of Harry Lord Ker, under his sense of these words, ‘ eldest daughter &c.’; he called upon the Court to award sequestration of the estate till there should be an end of the competition; and, after an answer put in by Mr. Bellenden Ker and his trustees, the proceedings before the Sheriff having been removed into the Court of Session, interlocutors were pronounced, which sequestered the estates in the hands of the Court, and appointed a judicial factor to manage them—an officer, I presume, in the nature of a receiver in other courts of equity, to manage the estates, and receive the rents, for the purpose of handing over the rents and profits of the estates, collected in the mean time, to that hand, which *ab initio* should be declared to have been entitled. Appeals have been entered by both parties against this interlocutor and against this sequestration.

" My Lords, Besides these proceedings, Colonel Ker took the usual measures for obtaining a service as heir of tailzie to the late Duke of Roxburghe, having purchased, as your Lordships know he must do, briefes from his Majesty's Chancery in Scotland, directed to certain officers, known by the name of the Macers of the Court of Session, for serving him the nearest and lawful heir of tailzie and provision in special to William Ker, the last Duke of Roxburghe. Sir James Innes also purchased briefes for serving himself heir of tailzie and provision; and, in consequence of that, a proceeding took place in the Court of Session in Scotland, which I understand to be usually denominated a competition of briefes. The other proceedings, which are usual in cases of this nature, then took place. The Court of Session appointed, as Assessors to the Macers, four of their own number, thereby giving to the Macers the most respectable assistance they could receive. In this competition between Colonel Walter Ker on the one hand, and Sir James Innes on the other, Mr. Bellenden Ker and his trustees interposed, and insisted to have a title and interest to be heard as parties in the services. They qualified their title and interest, as I understand it, thus: They said, that they had infestments or deeds which gave them a title to the possession of, and interests in the estates, the title to the inheritance of which was in question between the two competitors in these proceedings: And if Mr. Bellenden Ker and his trustees could make out, either that neither of these gentlemen were heirs of tailzie, of that one of them might be, and the other was not; they had an interest, in the first place, to displace them both, because then they might have no body to contend with in the actions of reduction; or they had an interest to displace one or other of them, because then they would not have so many persons to contend with in the actions of reduction: And the Court of Session were of opinion, as your Lordships will find, by an interlocutor, which is likewise the subject of appeal, that Mr. John Bellenden Ker, Mr. Henry Gawler, and Mr. John Seton Karr, had a title to appear in the services of Brigadier-General Ker and Sir James Norcliffe Innes, and to be heard for their interest. My Lords, There is a second interlocutor which asserts the same thing, that they have a title to appear; and finds also, that the points of law, with respect to the construction of the tailzie and settlements of the estate of Roxburghe, must in the first place be determined; and they recommend to the Macers, with their assistants, to hear counsel for the parties, and to proceed otherwise in the cause as to them should seem proper.

" My Lords, Upon this proceeding your Lordships will permit me to repeat the observation which fell from one of your Lordships as well as from myself, that it appeared to us, who are not so habitually sitting in a Court of Session as the Learned Judges below, to be a very singular species of proceeding; that it was a proceeding for which there was no analogy in the Courts in England; because,

1810.

KER, &c.
v.
INNES, &c.

1810.
 ———
 KER, &c.
 v.
 INNES, &c.

without establishing that these deeds of Mr. John Bellenden^d were good ; without establishing that Colonel Walter Ker was respectable individual in point of family whom he represents him to be ; without establishing that Sir James Innes Ker was the respectable individual in point of family whom he represents him to be ; the Court proceeds to give a judicial opinion upon the point of law, though it might turn out that not one of the parties before them had any right whatever to call upon them for it ; and this struck your Lordships, I know very much, in the case of the Petitioners, so much so, that I protest I do not know at this moment how to get over it, as a thing quite inconsistent with all our judicial usages and habits, to come to a determination upon a point of law till we are quite sure, that, in fact, we have some persons before us who have a right to call for that judicial opinion ; and it would certainly be a singular transaction in any court of justice, if, after having declared doctrinal matter in point of law, when you go to try the facts, it would turn out that none of the individuals before you had any right to call for your opinion in point of doctrine ; and if it should ultimately happen to have before you hereafter other persons really interested in the question, who should be able to persuade you that your present law was wrong, and to prevail upon you to reverse, as between proper parties, those legal adjudications which you had perhaps been led to form, because you came to them in the absence of the parties really interested in duly laying the case before your Lordships. I mean this as general observation only. I do mean to say, that it will apply to the conduct of the parties in this case before your Lordships. I am persuaded that some one or other of them have the interest or character here assumed, and that they really have given your Lordships as much information as ever given in any case, and the fullest possible information, in which can be given upon this case.

As to the
 Reduction.

“ My Lords, While these competitions were thus dependent upon questions of reduction, improbation, and declarator were brought, at the instance of Sir James Innes Ker, and also, on the part of the respondent, of Colonel Walter Ker, for annulling the commission granted by the late Duke of Roxburghe to Mr. Bellenden Ker, to his Grace's trustees, and on the 13th, (tho' signed on the 11th) of January 1807, the Court of Session pronounced this in the following terms : ‘ that the estates of Roxburghe were held by the late William, Duke of Roxburghe under an entail, which contains an effectual prohibition against altering the order of succession.’ There are no persons before us who can perceive, that you have a judicial declaration which should happen to turn out, that the Court of Session should have pronounced that your Lordships have not, upon the appeal respecting the validity of the deed, any persons before you, who, being able to prove their right, would have a right to contest, in these actions of reduction and declarator, Mr. Bellenden Ker, in the result of the matter it mi

here might be a declaration upon record against Mr. Bellenden at the suit of persons who, in such event, might turn out to no right at all to call for any such reduction ; and I mark the instance, because, however we may deal with it, it is right that it should appear our attention was called to it.

My Lords, There is another passage in the interlocutor of the 10th of January 1807, ' that the persons called to the succession in that branch of the destination, beginning with the eldest daughter of Mary Lord Ker, are heirs of tailzie under the said entail.' My Lords, If they were not heirs of tailzie under the entail, it has been intimated to your Lordships in argument, that they have no title to reduce the deeds, which had been granted to Bellenden Ker and his trustees ; that their briefs being sued out of Chancery for the purpose of having themselves declared to be heirs of tailzie under that entail, it was convenient, and it has been decided to be not only convenient, but, according to the usage of the Court of Session, to come to a decision upon such a point of law before they give the parties the trouble, or expose them to the necessity of proving their propinquity ; because, if they called upon them to undergo that necessity and that expence, and if, that after all they should be of opinion that neither of them were heirs of tailzie under the construction of the clause, which each of them insists is the correct one which furnishes the question of construction in that case, in proving their propinquity, upon reading that clause, it might turn out that they had given the trouble, and subjected to the expence of trying the question of propinquity, persons, with reference to whom it was quite immaterial what was the decision upon it. The question, however, whether they are heirs of tailzie, as a preliminary question of law, stands upon quite a different footing, or, at least, may be represented to stand upon a different footing, from the questions of law embodied in the first finding of these interlocutors ; for it is one thing to say, that the Court has determined, in Bellenden Ker standing here), that those persons shall make good that the persons called to the succession in the clause in question are heirs of tailzie, before they establish their propinquity, as they allege it, and another thing to say, *a priori*, that there is a principle of law, which will cut down Mr. Ker's deeds ; when it may turn out, that in the question of the propinquity of these gentlemen (posing persons called to be heirs of tailzie) the propinquity of Mary Lord Ker might be proved, and in that case no application against Mr. Bellenden Ker could be made at their instance, of the doctrine of reduction which would be found in the first part of this interlocutor.

My Lords, This interlocutor, consisting of these two parts, was first brought before the Court of Session ; and they affirmed the interlocutor, in their language, they adhered to their interlocutor ; by another of the 27th of June 1807.

In the competition of briefs, the case was reported to the Court

1810.

KER, &c.
v.
JAMES, &c.

1810.
 ———
 KER, &c.
 v.
 INNES, &c.

of Session ; and the Court directed the parties to argue it in memorials. It resolved itself into two questions. The first occurred between the appellants and respondents, upon the construction of entail. The appellants contended, That under the second clause of destination in all the investitures, (by the second clause is meant that clause respecting the eldest daughter and their heirs-male), the succession had devolved on the heir-male general of Lady Jean Ker, the eldest daughter of Hary Lord Ker ; the respondents, That under the same clause, it had devolved on the heir-male of the body of Lady Margaret Ker, his third daughter. As I had occasion to state to your Lordships yesterday, Mr. Bellenden Ker insisted with Colonel Walter Ker, that the only daughter described in this destination was the eldest daughter ; but he disagreed, and necessarily disagreed, with Colonel Walter Ker, in the idea, that the term heirs-male meant the heirs-male generally ; because, if the eldest daughter was called, with her heirs-male generally, then Colonel Walter Ker, stating himself to be the heir-male generally, would have a right to succeed, if he can make out that character : therefore, Mr. Bellenden Ker contended, that heirs-male did not mean heirs-male general, but heirs-male of her body ; and that of consequence, therefore, if the eldest daughter and the heirs-male of her body only were heirs of tailzie, and there was a failure of those heirs-male, the entail had opened to the clause which, as he insisted, gave the late Duke of Roxburghe a title to make such deeds as those under which Mr. Bel-den Ker claimed.

“ My Lords, on the 6th and 10th of March 1807, the Court of Session were pleased to pronounce this interlocutor : ‘ The Lords ‘ having advised the mutual memorials given in by the parties in this ‘ cause, in obedience to the interlocutor of the 18th day of February ‘ 1806, writings produced, and having heard counsel for the parties ‘ in their own presence ; they remit to the Macers, with this instruction, that they prefer the claimant Sir James Norcliffe Innes, heir-male of the body of Lady Margaret Ker, in the foresaid competition of brieves relative to the estates and honours of the family of ‘ Roxburghe ; and to dismiss the brieve at the instance of Brigadier ‘ General Ker.’

“ Your Lordships will not be surprised that a reclaiming petition was presented against this interlocutor ; because, if the Court of Session were right in supposing, that the destination included Margaret the third daughter, and the Court of Session were right in supposing that the term heirs-male meant heirs-male of the body, this interlocutor assumes in its terms, without any proof whatever, that Sir James Norcliffe Innes is heir-male of the body, and therefore prefers the claim of Sir James Norcliffe Innes, as heir-male of the body of Lady Margaret Ker ; and having done this, without proof of his sustaining the character of heir-male of Lady Margaret Ker, they go on to dismiss the brieve at the instance of Brigadier

eral Ker. Upon reconsidering that interlocutor, they pronounced cond, upon the 7th and 8th of July 1807, in these words: at they prefer the heir-male of the body of Lady Margaret Ker, the foresaid competition of briefes relative to the estates of the nily of Roxburghe, on his proving his propinquity; and in that ent,' (not absolutely, as in the former interlocutor), 'and in that ent, to dismiss the brieve at the instance of Brigadier-General er; and, with these explanations, they refuse the desire of the tition, and adhere to the interlocutor reclaimed against.'

1810.

KER, &c.
v.
INNES, &c.

My Lords, With respect to the language of this interlocutor, I not mean the substance of it, that is another way of viewing the s, they prefer the heir-male of the body of Lady Margaret Ker, his proving his propinquity. Whom do they mean by that? Is it James Innes, asserting himself to be the heir-male of the body? is this a declaration, intended to convey this as a doctrine of law, t if it turns out that nobody before them is heir-male of the body of Lady Margaret Ker, yet that this shall be an assertion in judg- nt for the benefit of any body who may in future time come be- e them, making himself out to be heir-male of the body of Lady Margaret Ker. With my very great respect for that Court, with rence to whom I cannot help saying, that I never saw a body of lical men who appeared to be more earnest in their attention to subject than they have been to this; and therefore, with the most pectful deference to them, I cannot help saying, that if this is a t doctrine of law, I entertain a doubt whether that doctrine of r is rightly expressed, in all the circumstances of this case; and ether they should not have said, that they preferred the claim of James Innes Ker, if he made himself out, by proof of propinqui- to be the heir male of the body of Lady Margaret Ker; and that heirs-male of the bodies of her elder sisters had failed. That, wever, is a small observation upon the interlocutor. At the same e, I mention it, as I am desirous not to omit any thing that oc- red to me in the course of the hearing of this cause.

"My Lords, Having stated to your Lordships my humble opinion h respect to the effect of the charter of 1747, and the subsequent ession, as founding the title upon prescription, connected with t charter, your Lordships will permit me to mention, what I have ed over in the historical account of these transactions, and which ainly I ought to have called your Lordships' attention to, I mean : instrument of release and renunciation on the part of Lady Mar- ret Ker, (I think upon her marriage,) which has been contended your Lordships' Bar to be an instrument effectual to put an end to r claim altogether, if she had a claim under the deed of 1648. y Lords, If the true meaning of the deed of 1648 be that which r James Innes Ker has contended for, it appears to me, and I te it without any hesitation or difficulty to your Lordships, to be possible to set up that instrument as a bar to the claim of these

1810.
 ———
 KER, &c.
 v.
 INNES, &c.

estates. It must operate to the extent in which it was intended it should operate; and in any view of the subject, as it appears to me, it never can be set up as an instrument effectual as a plea in bar to the present claim.

“ Having given your Lordships my opinion upon that, before I enter more particularly upon the consideration of the meaning of the clause, ‘ eldest daughter, and her heirs-male,’ there is another point upon which it is necessary that I should, with your Lordships’ leave, express the opinion which I entertain upon it; because it is a point which must be disposed of before we can very well agitate usefully, I mean the question, Whether the persons who claim under that destination are or are not heirs of tailzie? And *assuming* for the moment, (your Lordships will be kind enough to mark the words), *assuming* for the moment, that all the rights of the heirs of tailzie are guarded by clauses irritant, resolute, and prohibitory, sufficient to prevent an alteration of the order of succession, upon the point, Whether the persons named in that destination are such heirs of tailzie as are entitled to the benefit of those clauses so understood to prohibit alteration of succession? My Lords, the opinion which I have formed, has been an opinion which I can venture to represent to your Lordships as having undergone no change, (I do not say it is one bit the better for that); but as having undergone no change from the first moment that I read this instrument. I take it to be immaterial, to what part of a settlement or disposition of this nature, in what order or manner, except as to the priority of taking as heirs of tailzie, that persons described are inserted. I take it, that the true question is, upon the whole matter and contents of the deed, Whether the individuals named in a part of it, are meant and intended to have the same benefit of the clauses, provisions, conditions, and restrictions, which, it appears clear upon the face of the instrument, the persons mentioned in other parts of the instrument are designed to have? and the question, Whether these persons are heirs of tailzie? depends entirely, in my humble judgment, upon the question, Whether the estate was meant to be protected with the same anxiety expressed in the same clauses, or by reference to the same clauses, as the estates given to Drummonds and Fleming marrying the daughter of Hary Lord Ker? It appears to me to be sufficient to say, ‘ Read the deed;’ read it over and over again; and that is the conclusion to which you will come, in my humble judgment,—that is most undoubtedly the conclusion I have come to, that they are heirs of tailzie,—that the eldest daughter and her heirs-male whatever is meant by that expression, whether it is an expression describing her only, and describing her heirs-male generally or heirs-male of the body;—in the one case, she and her heirs-male are heirs of tailzie, in the other, she and the heirs-male of her body are such:—that if, on the other hand, it is meant to describe all the daughters *seriatim*, and their heirs-male generally, if that be the

port of the word, or the heirs-male of their bodies, if that be the instruction of the words, all the daughters and their heirs-male, as the words are to be understood, are heirs of tailzie.

" My Lords, If you shall be disposed to adopt that reasoning, we are next to consider, who is that heir? or who are those heirs of tailzie that are mentioned in this clause of destination? and it becomes necessary for me here to read that clause once more to your Lordships. But before I do so, I wish, if your Lordships would permit me, to request you always to recollect, that when you are construing such a clause as this, you are applying yourselves to the termination of a question which may depend upon principles entirely different from those which would belong to the consideration of the question, if it was a pure dry destination to heirs-male, or a pure dry destination to A. and his heirs-male, without more: That when you are applying yourselves to the consideration of a question which arises upon terms quite different, both in common parlance and in legal language, from those I have last mentioned, which arises, not out of a pure short dry limitation, described in strict legal terms, connected with an unquestionable designation of an individual, and an individual only, but that you are applying yourselves to the consideration of the question which arises upon a clause, consisting of great many expressions, a great many obscure expressions, and a great many expressions which consist of terms unquestionably flexible, which consist of terms flexible in common parlance, flexible in some instances which may be produced from the language of the law: That in such a case, therefore, your Lordships are to put the whole together; you are to see what belongs to each and every part of the terms used, and you are not to decide what would belong to any particular part, if it stood by itself unconnected with the rest; that you are to decide upon what is the meaning of each word, regard and reference being had to all the context;—and I venture to the length of saying, that if there has been any where an opinion that this clause cannot be construed but with reference to the words which form the clause itself, I venture humbly so far to differ from it, as to say, I apprehend it may at least be construed with reference to every thing to be found within the four corners of that deed which the clause is found.

" My Lords, Having stated this, your Lordships will be pleased to allow me to read this clause once more: ' And qlkis all failzeing be decease, or be not observing of the provisions, restrictions, and conditions above written, the right of the said estates shall pertain and belong to the eldest dochter of the said Hary Lord Ker, without division, and YR heirs-male, she always marieing or being married to ane gentilman of lawll and honourl descent, wha shall perform the conditions above and under written; qlkis all failzeing, and yr sds airis-male, to our nearest and lawful airis-male (somever.'

1810.

KER, &c.
v.
INNES, &c.

1810.
 KER, &c.
 v.
 INNES, &c.

“ My Lords, The first expression which occurs here is the ‘ eldest daughter ;’ and there can be no doubt, that, generally speaking, we should say, that was a destination to an individual ; it is impossible to deny, that in the former part of this deed, where Lady Jean Ker is mentioned as the eldest daughter of Hary Lord Ker, it was so applied ; it is impossible to deny that :—But, My Lords, on the other hand, you must consider, that the words ‘ the eldest daughter’ may admit of a very different construction, according as the context may require, or as the whole words of the deed may require. Take it, for instance, as it stands in our own law : I need not point out to your Lordships what the expression ‘ younger children’ *may* mean. I need not point out to your Lordships what the first born son of a person *may* mean with reference to the context. I need not point out how often your Lordships are driven, by the context, and by the different parts of the instrument, to say that a person is the eldest son who is not the eldest born son ; and these words, ‘ the eldest daughter,’ may at least admit of all these differences of exposition, and perhaps many more : Eldest born,—eldest at the date of the settlement,—eldest at the death of the author of the settlement,—eldest at the time the succession opens,—or the eldest according to the series in which they are brought up, the third to be the second, or the second to be the first.

“ My Lords, I am very ready to admit, that if there had been this sort of destination in the deed, ‘ to the eldest daughter and her heirs-male, with remainder to the youngest daughter and her heirs-male,’ I should not have known how, by any construction, you could have brought in by argument and inference the second and the third daughter, and their heirs-male ; and supposing there had been a limitation to the youngest daughter, it would have been a very difficult thing, I do not say altogether impossible, upon the context of the deed, to make the youngest a general term, sufficient to describe the daughter becoming from time to time the youngest. I think I could draw a deed upon my own conception of such a thing as that, to give the words ‘ youngest daughter’ that effect ; but it cannot be said generally they would have that effect : on the contrary, they would in general have no such effect. So as to the words ‘ second son,’ it is quite familiar to an English lawyer, and it seems to be so to the Scotch conveyancers, that he may be the second born son, or he may be the son who, being the third born, becomes the second within the meaning of that instrument : so that it is the context, contents, and plan of the deed that always decide it.

“ The next phrase that occurs is, ‘ eldest daughter of the said Hary Lord Ker without division.’ Now, upon the words ‘ without division’ I lay no further stress than this, that they are to have such an effect given to them as is due to them, being found in this place, and in this context, and in this deed ; and I do admit, that the words ‘ without division’ being used, because it has been proved that they

have in point of fact been used in this very case, without our being therefore entitled to say that a plurality of persons was intended by singular words, where the words 'without division' are applied; yet it must be admitted, on the other hand, that the words 'without division,' are words familiarly used with reference to a singular term, plural and collective in its meaning, as heir-female, for instance; and therefore the true way of considering these words 'without division,' is neither to give them too much meaning in the construction of the sentence, nor too little meaning in the construction of the sentence.

"So again, another observation has been made. It is said, if the eldest daughter was meant, the author of this instrument would have said, the 'said' eldest daughter. I think by some a great deal too much weight has been given to the want of that word 'said,' and that a great deal too little has been attributed by others to the want of it. The absence of the word in this clause, which is here to be interpreted, must have some weight.

"My Lords, It has likewise been said, and said with some weight, if it had been the intention of the author of this instrument to give this to Lady Jean Ker, why would not he have said Lady Jean Ker? Why does he say the eldest daughter? If the writer was pinched for room in this blank, to be sure the shortest way possible of expressing himself would have been to say, I mean to give this to Lady Jean Ker, and her heirs-male; but if it was meant to give it to Lady Jean Ker and her heirs-male, why use all this circumlocution and involved phrase? His meaning being supposed to be this, having to write within a cramped space, it is wonderful that he should not take the shortest mode of writing, but should adopt the most round-about way of doing it. That is an observation that deserves some weight; but I do not apprehend it deserves all the weight that has been given to it.

"My Lords, The next expression we have is a very material one, 'their heirs male.' Now upon that it has been argued, that the word *their* is an error, and you must read *her*; and it has been argued, unquestionably argued with great effect, that if you will only substitute the word *her* instead of the word *their*, the sentence will all read very well,—that it will then read,—'The right of the said estate shall appertain and belong to the eldest daughter of the said Mary Lord Ker without division, and her heirs-male, she always remaining, or being married to any gentleman (not in the plural number) of honour and law descent, who shall perform the conditions above and under written.'—And it is stated very truly, provided we were at liberty, in judicial construction, to act upon such a statement.—You want to correct the antecedent 'eldest daughter' by the pronoun 'their.' Now, say the other side, it is much more reasonable that we should correct the pronoun by the antecedent, and that it is much more reasonable, is evident from this, that the rest of the sentence will then be consistent, if you correct the

1810.

KER, &c.
v.
INNES, &c.

1810.

KER, &C.

v.

INNES, &C.

pronoun by the antecedent eldest daughter, for that they agree with the term as to the marriage, '*she* always means that you can correct the word '*their*' by the words '*daughter*;' but that you cannot correct the eldest daughter the word '*their*,' because eldest daughter is exactly the expression it ought to be. So again, as to the singular expression '*gentilman*,' that if you do not correct the pronoun '*their*' by the words '*eldest daughter*,' and by the subsequent expression instead of these words '*ane gentleman of honourable and lawful descent*,' you must read it '*so many gentlemen of honourable and lawful descent*.—And so, my Lords, it might again be put in another way. Suppose they were to give an interest in an estate to a son and *her* heirs, or to a daughter and *his* heirs, to be sure you will say you must correct the pronoun by the antecedent, and the antecedent by the pronoun—you will say, it must be a son and *his* heirs, and in the latter clause, a daughter and *her* heirs. My Lords, I admit all this, but this is never done but in a case of necessity. You cannot reject a phrase, except where it is absolutely necessary that you should reject it; and you cannot so correct it, unless there is an absolute and indispensable necessity that you should so correct it. If you can give a consistent meaning to the words forming the phraseology of a deed, I say that your Lordships are not at liberty to alter one syllable of it. You must take the deed as it is, and must make a consistent construction of it as it is. If you make a consistent construction of it as it is, and making a consistent construction of it as it is, if you can give effect to the words, I say then you are bound, by every judicial rule ever heard of in my life, to say that the author of a deed meant every one word and syllable that he has used. Then, my Lords, I am bound to this, that I cannot suppose there is any mistake; I dare not suppose it,—my duty will not permit me to suppose it; I can give a consistent meaning to all the words as they are,—I dare not suppose that any of these words were written by mistake, if a sensible meaning can be given to the whole of this sentence, the word '*their*' standing a part of it. That is my answer to your suggestion about error, that you cannot lightly infer that there was an error in transcribing a deed, or that you are to read '*their*' as they were written *her*. I say, if you are driven to it by necessity, necessity will justify it; but if it is not necessary, it is the most unjustifiable proceeding which can be taken in judgment.

"It is said, however, that it is of necessity, because the word '*eldest daughter*' is just as much a singular term—is just as descriptive of no more than one individual, as, in the case I have mentioned, of the second son and *her* heirs, or of the daughter and *his* heirs, the words son and daughter are. That I deny, because I have seen in your Lordships the different senses which this word may have in common parlance, and the different meanings it may have in legal documents. I say, eldest daughter is an expression which, without the

of construction drawn from the other parts of this instrument, might be represented perhaps as describing a class of persons; but in a deed where I find singular words describing classes of persons—where I find plural words describing individuals, I refer your Lordships to the clauses about taking the name and arms—to the clauses about the portions—to the small but important observations, as they appear to my mind, which, in passing through the contents of this deed yesterday, I offered to your Lordships' attention—when I find plural and singular terms are applied over and over again throughout this deed in the way in which they are, am I at liberty to say, that I am under such a necessity, such an invincible necessity, of considering the words 'eldest daughter' as meaning an individual, as to justify me in proceeding by a rule of construction, the last in construing instruments to be adopted—never to be adopted but in the case of inevitable necessity—to suppose that the word '*their*,' which the author of the deed has inserted in the deed, is not the word he meant to have inserted in the deed?—My Lords, I cannot do it.

"But then it is said, that the word '*their*' may be considered as applying to different individuals named or described in this very clause; that the word '*their*' may mean, for instance, the heirs of the eldest daughter, and the gentleman of honour whom she shall marry. With respect to this supposition, there are different observations to be made to your Lordships. If the word '*their*' has been properly rendered into either the Latin word '*eorum*' or '*ejus*,' this cannot be the meaning of the word '*their*.'

"If the proper translation was '*eorum*,' and the limitation is to the Lady and the husband she shall marry, and their heirs-male, does Colonel Ker with prudence contend for that? If it be so, then what do the words 'their heirs-male' mean? Must they not mean in that case, heirs-male of the body, heirs-male of the marriage.—I point out to your Lordships also, the vast change which you must make in the position of words to adopt this construction. But the words 'heirs-male' are stated in argument, to apply to Lady Jane Ker, the daughter of Lord Hary Ker, and Hary Lord Ker. It appears to me, however, that the father is named here for no other reason than to identify the daughter; and that the father should be here named to identify the daughter, when the daughter herself might have been identified, by using her name of Lady Jane Ker, instead of the words 'eldest daughter,' is not an immaterial circumstance, perhaps, to be attended to in construing the clause. There is another way also of considering this; because there might be different persons in different events, the heirs-male of the one and of the other, and then, who are the heirs-male meant? So that it appears to me next to impossible that the word '*their*' can be applied in the way in which it has been contended, even though you do not give much effect to the word *eorum* occurring in a very early part of the instrument

"My Lords, The clause proceeds thus :—'She always marrying,

1810.

KER, &c.

v.
INNES, &c.

1810.

KER, &c.
v.
INNES, &c.

' or being married to ane gentilman of honour and lawful d
' who sall perform the conditions above and underwritten.'—
this it is said, that these are singular terms. My Lords, t
singular terms ; but they are to be construed consistently w
plural terms occurring before, and the singular expression cap
a plural meaning occurring before—and then the question i
Whether she, that is, the eldest daughter for the time being,
eldest daughter *de tempore in tempus* coming in by substitu
not to be taken as meant. I take it, therefore, my Lords, t
question upon this is, Are you not to take every word here
word intended to be used by the author of the deed ? If you
take every word here as the word intended to be used by the
of the deed, the question then is, Are you not at liberty to c
the words of the clause ? It is impossible to say that this cl
a clause composed of terms which each and every of them h
meaning which, by the law, you are bound to attribute to the
Lords, I do not mean to say by that, that when you find o
the meaning of each and every of the terms used is, you
bound to attribute that meaning to them ; you certainly are
to attribute that meaning to them ; but you are not in this st
you must say, whatever may be the persuasion of your own i
to the meaning of each of these words, the law has put an in
construction upon these words. It is a very different questio
the construction of the words 'heirs-male.' It cannot be sai
reference to this branch of the argument, that the law ha
construction upon the words of this clause, which prevents y
putting upon them the construction which you are convinced
real meaning. Besides that, if they have no fixed meaning,
have they an obvious meaning ; for taking the words as they s
I may be permitted to use such an expression in this place, t
nonsense. They are words, however, of which, by const
you must make sense, out of which, by construction, you
create a meaning ; and you must make sense of the words
stand, if that can be done, for that is the rule of all law.]
driven to construction ; and being driven to construction, I
are not to construe this clause upon the observation made u
want of the words 'Lady Jean Ker'—upon the observatio
the word 'said' alone—upon the observation upon the
'without division' alone—upon the observation upon the
'their heirs-male' alone—upon the observation upon the wor
'always marrying' alone—upon the observation upon the w
'gentleman of honourable and lawful descent' alone : But ;
to look for the meaning of the words in the aggregate of the
vations arising out of each, and every, and all of those wor
putting together the whole of the observations, to say what
probably the intention of the author of the deed, regard bei
to every observation which can be made reasonably upon i

each of the words of the author of the deed. And, my Lords, I go further, and I say, that, in my opinion, you are fully at liberty to look to every part of this deed; and I say, that elsewhere in this deed you find words which unquestionably create a succession in their legal effect, which, as to their obvious meaning, have no such effect; but which, in their legal construction, you must hold to create such succession;—that you find in this deed, in many parts of it, singular terms, yet unquestionably showing themselves by their context, to have a plural meaning, and to describe classes of persons; that you find singular terms unquestionably meaning plural things;—that you find in this deed plural terms which must necessarily mean individual and singular things. You are to construe this deed, therefore, as the language of the author of the deed, and the language, which, *uno flatu*, the author of the deed has spoken. You must collect from his style and manner of language, taking the whole of it together, what he meant by every part of that instrument which contains his language.

“My Lords, I have no inclination to deal with other questions which have been submitted to your attention. It has been said, that your Lordships are not to look at the deed of 1644—this has been said by those by whom, nevertheless, your Lordships have been called upon to look at all the deeds prior to 1643—and by whom your Lordships have been called upon to look at all the procuratories of resignation, and all the charters prior and subsequent to 1648; and if you have been called upon at the Bar, to do that with a view to say, that, because in those other charters the authors of them meant to make particular destinations, therefore they must have meant, in this charter of 1648, to make the same destinations. My Lords, I am ready to admit, that that is a mode of proceeding which I cannot reconcile to any principles of law which I have been taught. It is for that reason I here state to your Lordships, that I can give no weight at all to the arguments I have heard from the Bar, that it was not the intention of the author of the deed of 1648, to alter the destination of this deed of 1644. I cannot read the deed of 1644, and the deed of 1648, without seeing that he did mean to alter in some respects the destination of his property; and when I apply my mind to the question—did he mean to alter the destination of his property among his grand daughters, failing the institute and the substitutes? My Lords, I do not look to the deed of 1644 to teach me what he meant to do by the deed of 1648 in this respect. I look at the deed of 1644 to see what he has done in this respect in the deed of 1648; having regard to the whole of that deed, and informing myself no otherwise from the deed of 1644 than I should do from a charter in any other family, that is, looking to it, as an instrument to teach me what was the Scotch law-language in deeds of that period.

“That the deed of 1644 had some very material passages in it in

1810.

KERR, &c.

v.

INNES, &c.

1810.
 KER, &C.
 v.
 INNES, &C.

this view, I think your Lordships could not but observe, who gave you the detail of it yesterday. I think your Lordships could not but have observed, that I have given very little weight too great deal of argument we have heard at the Bar, as to the predilection which the author of this deed is supposed to have had for grand-daughters over the heirs male general, for the three young grand-daughters as well as the eldest grand-daughter, and predilection which he is supposed to have had for the young grand-daughters over the heirs of any description. My Lord, if you look to the effect of this instrument, all that you can say about it in this respect is, that having provided destinations for his estates to the four daughters of Hary Lord Ker, marrying their favourite persons the institute and substitutes, in the order in which he had so provided for them, it is probable that, if these marriages never took effect at all, he should intend that there should be the same provision for these daughters, *seriatim*, not marrying an honourably descended Drummond, or an honourably descended Fleming, but a lawfully and honourably descended gentleman of any other name. One cannot imagine why he should have had the fancy of going through this substitution, in case of their marrying those favourite individuals, and why he should not have had the same fancy, to go through the same substitution, if it should turn out, that the gentlemen, the Drummonds and the Flemings, did not find the Ladies to their taste, but left these Ladies to marry other gentlemen of honourable and lawful descent ;—why he should mean to exclude his second, and third, and fourth grand-daughters in this case,—it is very difficult to conjecture that that should be his meaning ; but, my Lords, if the deed clearly expresses it, you must give effect to it. You cannot fancy for him, you cannot insert destinations he has not inserted ; and when you recollect how he has passed over the youngest daughters of some, and the grand-daughters of others, it is impossible to deny that there is a great deal of argument upon matter of probability, to be submitted to your Lordships' consideration on both sides.

“ Then, my Lords, your Lordships have heard it argued, Why could you possibly suppose there are four substitutions in so short a clause as this ? My answer is, I can suppose four substitutions in a much shorter clause. If you ask me, Can I suppose, that if there were four substitutions, they would be expressed in this way ? My answer to that is, that inexperienced a Scotch Lawyer as I am in conveyancing terms, I think I could have drawn a much better deed than this in reference to this destination. But I think, if your Lordships differ from me in this part of the case, I should be entitled to ask you, on the other hand, Can you suppose, that if the author of this deed meant simply Lady Jean Ker and her heirs-male he would have used all the words you find there ? If that had been my meaning, I would have drawn a much better deed than this

with a view to effectuate that intention. But, my Lords, I do not go upon these grounds. Without entering into the question, of how much more, or how much less of weight belongs to all these probable reasonings; without entering into the question, of how much more, or how much less of weight,—whether any, and if any, what degree of weight, is to be given to the prior charters,—the charter of 1644,—to the subsequent charters looked at as evidence;—without reference to the question, Whether, if they can be looked at as evidence, they do more or less establish the propositions which each side has endeavoured to maintain upon them:—My Lords, without entering into any thing but the construction, the best construction that can be made of this instrument of 1648 itself;—attending to every word of that instrument which can furnish a fair argument to say that the eldest daughter means only Lady Jean Ker;—attending to every provision in, and to every word of that instrument which shews that the word ‘eldest daughter,’ (a term capable of meaning, and in common parlance meaning neither more nor less than the eldest-born daughter,) was to be applied, sometimes to one individual and sometimes to another, and more than one individual,—which shows that the singular word *person* was sometimes to be applied to one individual, and sometimes to another, and more than one individual:—attending to every provision and word which shews the meaning of the words, ‘her,’ ‘them,’ ‘their,’ ‘person,’ ‘portion,’ ‘daughter,’ and all the plural and singular senses in which they occur; and attending to the whole of the phrase of this clause,—to every word of this clause as the very word which the author of this deed meant to insert in his deed, because he has inserted it, and upon this great leading principle, that in judgment you never can (unless you are justified by unavoidable necessity) reason upon the supposition that the man has made a mistake, by inserting in a deed the word which he has inserted in it; admitting, that where you are driven by absolute necessity to do that, you must do it. Attending to the whole and every part of this deed of 1648 itself, after the most anxious and attentive consideration, and on the deliberate consideration which I have given to this deed, I offer to your Lordships my humble opinion upon this first point of the cause, that the words, ‘eldest lawful daughter, and their heirs-male,’ mean (whatever be the meaning of the words ‘their heirs-male,’) the daughters *successive et serialim*; and that if the heirs-male, according to the true interpretation of this deed, of Lady Jean Ker have failed,—if the heirs-male of Lady Anna, the second daughter, according to the true interpretation of this deed, have failed,—then that the heirs-male of Lady Margaret, according to the true interpretation of these words ‘heirs-male,’ are entitled as heirs of tailzie under this deed. My Lords, I wish to be understood here: I say, if they have failed. I observe, that in the Court below, and in many of the papers, they have had another way of considering this, and that is,

1810.

 KER, &c.
 v.
 INNES, &c.

1810.

KEE, & Co.
v.
INNES, & Co.

that a daughter could not become the eldest daughter, unless the eldest sister died in her lifetime. That is not my idea of the true meaning of this instrument. If it is a *seriatim* substitution, as I think it is, in my view of the case, it is immaterial whether the eldest sister died before the younger or not; the eldest *debito tempore*, or *de tempore in tempus*, by herself, and in her heirs-male, that is, in the series in which she and they were called, would, in my opinion, be entitled to take the succession.

“ Having offered to your Lordships my humble judgment upon this one point, your Lordships will permit me now to say, that I have very studiously hitherto refrained from saying one syllable indicative of any judgment I have formed with respect to the words ‘ heirs-male.’ Whether the words might be understood to mean, heirs-male generally, or heirs-male of the body. I have done so for this reason principally, that though undoubtedly as long as I shall live to remember this cause, if I shall have made a mistake in the part of it that I have discussed, and your Lordships shall act under my mistake, to the longest time I shall live to remember this cause, from the moment I am convinced of my mistake, I shall deeply regret it, considering the important interests here at stake; yet I am aware, that of this branch of the cause it may be said, it is but mistake which affects this particular case, and that it is important principally to the parties only; but with respect to the other question, I have been anxious to keep it distinct, for this reason, that the decision upon that is to affect not this case alone;—that it is a decision to which your Lordships cannot come, without considering it upon its principle,—without considering it with reference to precedents,—without considering it with reference to its consequences,—without considering it with reference to all the ways in which it may affect, and most deeply affect, landed titles and titles of honour. My Lords, I have formed an opinion upon it, and that opinion I shall take a very early opportunity of delivering to your Lordships but I look upon that part of the case as so extremely important that I have been anxious, as far as my mode of reasoning would enable me to keep them distinct, to take care not to confound one point with the other; that with a view to come to the right conclusion upon that second point, your Lordships may find yourselves in possession of observations so laid before you upon the first point that you might be able to apply them in the consideration of this case to that point only.—I shall now, with deference to your Lordships, humbly propose, that having given my opinion upon this first point, in the course of this afternoon, you should adjourn the further consideration of this case; and if your Lordships will have the condescension to grant to the individual who now addresses you that request, I should hope you will not feel yourselves unwilling to permit me to proceed upon the consideration of the next branch of the cause on Monday at eleven.”

Third Day.

Monday, 19th June 1809.

1810.

KER, &c.

v.

INNES, &c.

“ My Lords,

“ On the last day on which your Lordships met for the consideration of this cause, I submitted to your Lordships, as my humble opinion, that the persons described in the clause in the deed of 1648, commencing with the words ‘ which all failing, to the eldest daughter and ‘ their heirs-male,’ were to be considered as heirs of tailzie. I also stated to your Lordships, that it did not appear to me that it would be possible to hold, that, under the effect of the instruments subsequent to the year 1648, connected with possession upon any ground of prescription, the investitures of the estate were changed from those which stood as the regulating rule of the succession in 1648. I likewise stated to your Lordships, that, in my judgment, the deed of renunciation and appointment upon the marriage of Lady Margaret did not destroy the title which Sir James Innes now insists upon, if Lady Margaret ever had a title ; and I further added an opinion which I had formed, and which, upon reconsidering it since I last had the honour of addressing your Lordships, I have not found reason to change, but which, I might, I think, be justified in saying, I hold more firmly than I did even then, that the destination to the eldest daughter, connected with such a context as that in which it occurs,—occurring in such a deed as that in which we find it,—I do not mean a deed as partaking more or less of a testamentary nature, but a deed, such in its contents, such in its expressions, and such in its objects, as this deed of 1648,—that the singular term ‘ eldest daughter,’ connected with the plural pronoun ‘ their’ heirs-male, and the other terms of the clause, did constitute a *seriatim* substitution of the four daughters of Hary Lord Ker, and their heirs-male, of some species. My Lords, I have only to add to that, (which, it may be proper for me shortly to intimate, although, for reasons I before alluded to, it is impossible for your Lordships to come to any decision upon the question of dignities), that, giving as pointed an attention as I could to what has been stated from the Bar, with reference to the effect of this charter of 1648, as intended to pass the Earldom of Roxburghe, and to what has been stated at the Bar as to its efficacy or inefficacy in passing that Earldom, regard being had to the seal by which it is supposed to be authorised, and to the other circumstances which formed the topics of argument upon this head at your Lordships’ Bar ; it occurs to me, that it may not be unfit that I should state to your Lordships, that my opinion upon that question which we last discussed, as well as upon that which we are this day met to discuss, would be precisely the same,

1810.

KEE, &c.
v.
INNES, &c.

whether the honour does or does not pass by the deed of 1641. That it was intended to pass, is certainly the opinion of the individual who now addresses you; but whether it did or did not pass whether it was or was not intended to pass, would not, in the judgment of that individual, much affect, not materially affect, the decision of the questions with respect to these estates.

Import of
"Heirs-male"
used in the
deed.

"My Lords, The question now presenting itself to our consideration, I would put very shortly thus: Whether the words 'heirs-male,' in the clause to which we have so often had reference, mean in the intention of the author of this deed, as that intention is to be collected from the context and the other parts of the same instrument, for so I would put the case to your Lordships, whether the words 'heirs-male' mean heirs-male general? or whether they mean 'heirs-male of the body' of the person or persons to whom they refer? And, my Lords, having stated it to your Lordships as my opinion, that there is a succession of substitutes among these daughters, the question, as put by me at least to your Lordships, must be: Whether these daughters *successive*, and their heirs-male, mean a description of persons, heirs of tailzie, and their heirs-male general or the heirs-male of their bodies? and that question arises among daughters designed, in my view of the subject, to take one after another in that species of succession.

4 Burr, 2579.

"I need not tell your Lordships, that the law of Scotland, as to descent, is very different from the law of England. It is therefore not my intention to trouble your Lordships with any observations upon the rules of English law with reference to the interpretation of deeds and papers. I apprehend it is hardly safe to do that. This case must be decided by Scotch law, as well as we can collect it, as applicable to dispositions of this kind, to take effect after the death of the author. We are to apply Scotch rules as to deeds or wills which, your Lordships know, are very different from our rules; and in that view of the case, I lay out of it all consideration of the much agitated case of Perrin *versus* Blake, and some other cases which happened in England when your Lordships and I were young; because it does not appear to me that we can borrow much of useful argument from them.

"My Lords, this question is to be decided by discussing it upon principles, by discussing it with reference to the cases which have been determined, and by endeavouring to apply, as well as we can, the principles resulting out of general doctrines, and the principles to be gathered from the cases which have been decided, and bear upon the same points, applying, as well as we can, those principles, to assist us in the construction of this instrument.

"My Lords, I shall begin with the cases first; because, if it be true that the case of Hay of Linplum has fixed this as a rule of law—as I see some of the judges in the Court below seem to have thought—that the words 'heirs-male,' occurring in such a destination as this—

I repeat the words, 'occurring in such a destination as this,' had that precise, fixed, technical meaning, which no intention, however clearly expressed, could control, which no intention, however clearly manifested, can separate from the words, it is in vain we look beyond the cases; and it is in vain we look to doctrines; for if there be a solemn decision in this House which governs the present case, upon the ground upon which I am now putting it, *cædit questio*. It would be mis-spending time to discuss the matter further.

"My Lords, Till I looked back to the date of the case of Hay The Linplum Case. *versus* Hay, and found there the name of the person who is now addressing your Lordships, as having been counsel in it, I acknowledge to your Lordships, that I had totally forgotten the case,—that I knew no more of it when it was mentioned at the Bar, than if I had never been employed as counsel in it. I have two apologies to make for that to your Lordships; one, that I have lived many years since that case; and the other, to assure your Lordships, that I am not surprised that so much matter as has been pressed into my head since, should have pressed out of my head the matter which was then in it. I have, however, my Lords, the papers in that case before me; and the question is, Whether it be possible to maintain, first, that this was *necessarily* the opinion of the House of Lords when it decided that case? Secondly, If this was not *necessarily* the opinion of the House of Lords when it decided that case, whether the House went upon any other principle, than that it thought itself bound, in that case, to say, that it was the intention of the author of that deed, that the heirs-male generally of Alexander Hay should take; or that it was not the clear manifest intention that they should not take. My Lords, Before I state to your Lordships the deed itself which was construed in the Linplum case, you will permit me to say, that the question, Who are meant by a destination? has been considered with more or less of laxity by different Judges in the Courts below. Some of them seem to have been of opinion, that entails, which are *strictissimi juris*, are so with respect to the fetters only. Others have thought, that they were *strictissimi juris* with respect to the construction of the words which were meant to describe the persons intended to take under the destinations: and it has been put, and well put to us, that it is, in a sense, a question of fetters; because it is necessary for every person put under fetters to be able to collect in a deed, whom the fetters attach upon, and by whom those fetters can be enforced; and I think I may therefore, in a sense, venture to state to your Lordships, that the construction adopted ought to be the clear and fair construction of the words.

"My Lords, The Linplum case arose upon a settlement, with reference to which, I should not do justice to the present case, if I did not state, that, like this Roxburghe case, it was a regular entail;—like this Roxburghe case, it was not to take effect till after the entailor's death;—like this Roxburghe case, the question discussed and decid-

1810.

KER, &c.
v.
INNES, &c.

1810.
 KER, &C.
 v.
 INNES, &C.

ed in it was a question of competition between heirs,—it involved nothing with respect to creditors or onerous purchasers : there not therefore that distinction in it, which, your Lordships recollect we have heard much of at the Bar ;—it was upon the construction of a clause, relating to a destination—it was upon the construction of a clause, upon which the question depended, On whom, and in favour of whom, the fetters were imposed ?—it was upon a construction of a deed, in which it is undeniably true, that there were strong circumstances to infer an intention, in the use of the words ‘ heirs-male,’ to limit to ‘ heirs-male of the body’ of the party. It is indisputably true, too, that it was a case in which subsequent substitutions included the very individuals who would fall under the description of heirs-male of Alexander Hay. It was a case, too, in which it must be admitted, that a very useless but anxious attempt was made to separate the Linplum property, in certain events which might take place, from the Tweeddale property, from the Drummelzier property, from the Roxburghe property. It was a case, in which it must be indisputably admitted too, that the phraseology of the deed furnished, in different instances, and in numerous instances, both the words ‘ heirs-male,’ ‘ heirs-male of the body,’ and the words ‘ heirs-male whatsoever.’ It was a case too in which, in certain events, the supposable intention of the author of the deed, I say the supposable intention of the author of the deed, (for though, in the construction of instruments, we are, judicially speaking, to suppose, that every granter foresaw all the events to which his words can be applied, yet, in point of fact, we know that is not the case), that the supposable intention of the entailer would be defeated. All these circumstances may, I think, be predicated of that Linplum case ; and it is fit that your Lordships, with a view to determine what weight is due to my opinion, should be informed, that I am aware that all those circumstances may be predicated of that case.

“ Having stated so much, your Lordships will now permit me to state to you the substance of the deed in that case. It was made by Sir Robert Hay of Linplum ; and he disposed to himself, and to his sister Lady Margaret Hay in liferent, and to the second son to be procreated of the body of the Most Honourable John Marquis of Tweeddale, and the lawful heirs-male of his body, in fee. And I stop here a moment to observe, that this case was open to precisely the same observations as have been made upon the Roxburghe case ; that there are express limitations, in four or more instances, prior to the destination to Alexander Hay, to persons, and ‘ the heirs-male ‘ of their bodies begotten,’ in terms ; then to the third lawful son, and to the heirs-male of his body ; and so on, to all the Marquis’s younger sons, one after another ; and failing all his lawful sons, and the lawful heirs of their body, to the Right Honourable Lord Charles Hay, brother-german of the Marquis, and the heirs-male to be procreated of his body ; whom failing, to the Right Honourable

George Hay, another brother-german of the Marquis, and the 1 heirs-male to be procreated of his body; whom failing, to Alexander Hay, second son to Alexander Hay of Drummelzier, and his lawful 'heirs-male.' My Lords, This second son had elder brother of the name of William, and he had either three or younger brothers; and I press upon your Lordships' attention circumstance, that he had three or four younger brothers; whom failing, to the Honourable John Hay of Belton, Esq.; and his lawful heirs-male.' He had also a younger brother; 'whom failing, to the Honourable John Hay of Lawfield, Esq.; and his lawful heirs-male.' I think I am correct when I say there was a younger brother of him also; 'whom failing, to Lord Robert Ker, and lawful son to the Duke of Roxburghe, and his lawful heirs-male; whom failing, to the heirs-female lawfully to be procreate of the bodies of the several persons above mentioned, one after the other, beginning with the heirs-female to be procreate of the body of the said John Marquis of Tweeddale, and observing the same order and course of succession above written, the eldest heir-female surviving heirs-male, always excluding the rest, and succeeding without division; and that whenever, and as oft soever as the succession, upon the failure of heirs-male, shall happen to fall or devolve to heirs-female; whom failing, to my own nearest lawful heirs and signees whomsoever.'

'Your Lordships therefore perceive, that the destination was of this sort: It was a destination to the second and other sons, and the heirs-male of their bodies, of the Marquis of Tweeddale;—it was a destination to Lord Charles Hay, and the heirs-male of his body;—it was a destination to Lord George Hay, and the heirs-male of his body;—it was a destination to the second son only of Alexander Hay of Drummelzier, and his heirs-male;—it was a destination to John Hay of Belton himself, and his heirs-male;—it was a destination to John Hay of Lawfield himself, and his heirs-male;—it was a destination to the second son of the then Duke of Roxburghe, and his heirs-male; and then it was a destination to the heirs-female of the bodies of the several persons above mentioned, and the heirs procreated of their bodies. Your Lordships will be good enough to keep in mind this variegating, (if I may so express myself), the variegating nature of these respective destinations.

"My Lords, He proceeded to bind and oblige his heirs to infeoff these persons, Mrs. Margaret Hay, his sister, in liferent, and the second son of the Marquis of Tweeddale in fee, and on failure of them, the other substitutes and heirs of tailzie above specified; and then he goes to that part of the instrument which contains an obligation to resign. He repeats in that again the same limitations; and then he proceeds to state himself thus: 'With this express provision, that the said second lawful son to be procreate of the said Marquis of Tweeddale, and the heirs-male of his body, and also the

1810.

KER, &c.

INNES, &c.

1810. ' whole heirs of entail before mentioned, succeeding in the right of
 ' the said lands, annualrents, and others, shall be obliged to assume,
 ' and constantly to retain, use, and bear, the surname and designa-
 ' tion of Hay of Linplum, and use the arms and coat-armorial of
 ' this family, as their own surname, designation, and coat-armorial
 ' in all time coming. And it is hereby farther provided and declared,
 ' that it shall not be leisome nor lawful to the said second son to
 ' be procreate of the said Marquis, or the lawful 'heirs-male of his,'
 ' (that is, the lawful heirs-male of his body), nor to any of the said
 ' heirs of tailzie, nor their descendants, to alter that destination.'
 I will not trouble your Lordships by going through all the prohibi-
 tory, resolute, and irritant clauses: the first material expression
 that occurs here to be laid hold of, by way of applying it as a con-
 text, constructive of the clauses of destination, which I need not tell
 your Lordships are the clauses most material to be looked at in
 these cases, is this: ' It shall not be leisome nor lawful to the said
 ' second son to be procreate of the said Marquis, nor the lawful heirs-
 ' male of his.' My Lords, No man can deny, that the words,
 ' lawful heirs male of his,' there mean, 'heirs-male of the body,'
 because these his lawful heirs-male who were to take were heirs-male
 of the body; and therefore this is an instance of itself, not how fit it
 may be in general cases, or in most cases, or in any particular case
 other than this, to say that the words 'lawful heirs-male' will
 admit of a construction, which gives to them the same meaning
 as if the words had been 'lawful heirs-male of the body'; but it
 proves this truth undeniably, that there *may* be some cases in which
 'lawful heirs-male' must mean 'lawful heirs-male of the body'; for
 here they cannot mean any thing else. 'Nor to any of the said
 ' heirs of tailzie, nor their descendants:' It was observed upon these
 words, 'their descendants,' that these words were material to show
 that the author of this deed meant *throughout* 'heirs-male of the
 ' body,' because none but heirs-male of the body can be descend-
 ants. It was answered on the other side, that the word, at any rate,
 was but surplusage; that the words 'heirs of tailzie,' would include
 all heirs of tailzie, whether descendants or not; and that the words
 'their descendants' were most clearly used, not in their strict pro-
 per sense, because descendants would not only include heirs-male of
 the body, but heirs-female of the body; and the question upon the
 whole instrument was, Whether 'lawful heirs-male,' 'lawful heirs
 ' of his,' 'lawful heirs of his body,' 'heirs of tailzie,' 'or descend-
 ' ants,' were not, each and every one of them, meant, *referendo singulis*
singulis, to describe the heirs of tailzie, whether heirs-male general
 or heirs-male of the body, as the whole of the respective clauses of
 destination pointed them out, as being heirs-male general, or heirs-
 male of the body. In another part, the expression is, 'lawful heirs-
 ' male aforesaid,' which *may* mean both species of heirs-male. It is

be observed, that the word 'descendants' occurs, I think, five or different times in the instrument.

'My Lords, There was then a clause which was thought to material. After describing the several cases and acts in which I by which this tailzie might be prejudiced, it says, 'Then and in that case, every one of the facts and deeds to be done in contravention hereof by the said second lawful son to be procreate of the said John Marquis of Tweeddale, or his 'heirs-male' aforesaid.' ere your Lordships see, that the words 'heirs-male' apply to those who are, in the beginning of the deed, expressly described as heirs-male of the body lawfully begotten. In the passage I have last read, there are no such words as 'of the body lawfully begotten;' but there is a context which must help you to the construction of the words 'heirs-male' in the clause I have pointed out, regard being had to the clause destining to heirs-male. This simple word 'aforesaid' is, as the word 'said' is in many instances, as the words herein before provided,' 'herein before nominated,' are in many instances, explanatory words of context, this word of context going to make out what heirs-male are intended in the description to which the word is annexed. 'And further, the said second lawful son to be procreate of the said Marquis of Tweeddale, and his 'heirs aforesaid:' There, your Lordships observe the word 'male' is dropped, as well as the words, 'of the body,' and the word 'aforesaid' must be understood as the context to the word 'heirs,' including in it a description amounting to precisely the same as if the word 'male' had been inserted, and as if the words 'lawfully begotten of their dies,' had also been inserted.

There was then a clause, my Lords, which is a very material one. If it shall happen that the right of the subjects hereby entailed shall devolve to the said second lawful son of the Marquis of Tweeddale before his existence, then it shall be lawful to the said Lord Charles Hay, or to the nearest heir of entail in being at the time, to establish titles in his person to the lands and others therein mentioned, and to enjoy the rents and profits thereof, until the first Martinmas or Whitsunday inclusive following the birth of the said Marquis's second son; and then the said Lord Charles, or nearest heir aforesaid, shall be obliged to denude himself in favour of the said Marquis's second son, in the same manner as is here provided if the said Lord Charles Hay had succeeded upon a contravention of an heir of entail.' The professed object, your Lordships serve, of this deed is, that the Tweeddale estate and the Linplum estate should not come together; and at the same time the express object is, that the Linplum estate should go to the second son of the Marquis, whether he was come into being at the time the succession opened to him or not; and I think I may venture to repeat the observation with which I troubled your Lordships on Saturday, that nobody can doubt that these words 'second son' must mean second

1810.

KER, &c.
v.
INNES, &c.

1810.

KEE, &c.
v.
INNES, &c.

son for the time being, and that it is a singular term, including a persons who might answer that description.

“ My Lords, We learn that the events that happened were these Sir Robert Hay died without issue in 1751. I ought to have mentioned, because it is a circumstance taken notice of, and for that reason only I ought to mention it, as I really do not think there is an weight in it, that he had executed a settlement of his personal estate in favour of the same series of heirs, which was only another proof of his determination to use the same destinations. He died without issue in 1751; and John, then Marquis of Tweeddale, having but one son, the succession devolved upon Lord Charles Hay the Marquis's immediate younger brother, and the first substitute in the aforesaid deed of entail, failing younger sons of Marquis John Lord Charles also having died without issue, the succession next opened to Lord George Hay, the youngest brother of the Marquis. The Marquis of Tweeddale left issue an only son, an infant, who died in 1770, when the dignity and estate of Tweeddale devolved upon Lord George Hay, the late Marquis, (who was such at the time this case occurred). Alexander Hay, the second son of Alexander Hay of Drummelzier, and the next *nominatim* substitute in Sir Robert Hay's deed of entail, having died before this period without issue, the respondent, Robert Hay of Drummelzier, who was one of his younger brothers, insisted, that, as heir-male of his brother the deceased Alexander, heir-male of him, though not heir of his body, he was entitled to the estate; he brought an action for the purpose of trying that question; and having brought that action, it was determined by the Court of Session, and I think afterwards by your Lordships, that the Marquis was entitled to keep these estates till he should have a second son of fourteen years; and the estate of Linplum was accordingly held by the Marquis till his death in 1787. Upon that the respondent renewed his claim, and there was an adverse competition for the estate. The appellant was Miss Frances Hay, who was the only child of the marriage of William Hay and the deceased Lady Catherine Hay. She insisted, she had a title to the estates under the effect of that clause of destination which I have stated to your Lordships, relating to females who were to take; and the question which was actually agitated and decided in that cause was, Whether the brother of Alexander, as the heir-male of Alexander, was entitled to the estate? or, whether the limitation to the heir-male of Alexander meant a limitation to the heirs-male of his body? If it did, his brother, not being the heir-male of his body, could not take, and then the substitution of the female line had opened.

“ My Lords, The Court of Session were of opinion that Alexander's brother was entitled, and that this instrument was so to be construed. They did not form that opinion either upon the notion, that the terms were altogether inflexible, or upon the notion, that

there was nothing in the deed to show that it was not the intention of the author of the deed, that those words were to have in construction what, it was admitted on all hands, was their obvious meaning, and their *prima facie* meaning. They seem to have relied also upon a case of Baillie *versus* Tennant, which does not appear to me to have had much application to the subject that came before your Lordships in the Linplum case, when it was argued at this Bar. I cannot charge my recollection with the matter of fact by whom the Linplum case was argued on all sides. I think it was argued by Mr. Wight and Mr. Tait, both gentlemen whom your Lordships recollect to have been very considerable in their profession. I speak from a full persuasion upon memory, when I say, it was very ably argued by the late President of the Court of Session; and I had the honour of giving him my very feeble assistance upon that occasion. I observe that, in his situation as Lord President, he makes upon the present occasion an observation, to the accuracy of which I can bear a good deal of testimony, I mean from my own individual experience, that we professional men are sometimes extremely discontented with decisions which, after a lapse of some few years, perhaps, we can subdue our obstinacy so far, as to admit them to have been quite right. I believe we were both out of humour with the decision, perhaps not very reasonably.

“ My Lords, The whole argument was before your Lordships in the papers laid upon your table, signed by Mr. Wight and Mr. Tait; and it does appear to me to be so material to lay the whole of that argument before your Lordships again, with some comments upon it, with a view to the right decision of this case, that I am sure your Lordships will spare me as much time as shall be necessary for that purpose. My Lords, if it had been true that the Noble Lord who then sat upon the wool-sack, and any other Noble Lords then present in the House, deemed it to be clear in the law of Scotland, that these words ‘heirs-male’ occurring in such a deed as this Linplum charter, looking at the clause in which it occurred—looking at all the expressions of the instrument—that they necessarily, imperatively, and inflexibly must mean ‘heirs-male general;’ to be sure they suffered Mr. Tait, Mr. Wight, Sir Ilay Campbell, and myself to be guilty of a great deal of impertinence, for it was argued at much length—your Lordships will, I think, see by the cases, that the case turned upon this,—that the words ‘heirs-male’ had a *prima facie* obvious fixed meaning, not to be torn from them, except upon what might be stated to be declaration plain of intention, and, to use Lord Hobart’s phrase, declaration plain, or absolutely necessary implication.

“ Your Lordships will see, from the printed cases, that the argument went upon the question, Whether the intention was sufficiently manifested to destroy the general meaning of the words? When I say it went upon the question, whether the intention was sufficient-

1810.

 KER, &c.
v.
INNES, &c.

1810.
 ———
 KER, &c.
 v.
 INNES, &c.

ly manifested, I do not mean to say the other question was not discussed—far from it;—but that the decision did not necessarily establish that principle of inflexibility, which has been contended for at your Lordships' Bar, I think myself fully entitled to assert. I am confident that, if it had been the intention of this House to have asserted a great principle of that kind, your Lordships would have found it embodied in the judgment; and if you do not find it embodied in the judgment, and the case will admit of a consideration not necessarily establishing so large a principle as that, your Lordships will hardly infer, that the case meant for ever to establish that as a principle, and an inflexible rule of law. I am sure I need not remind your Lordships of the caution with which you proceed as to laying down principles to regulate cases—not laying them down unnecessarily—not forbearing to express them when you mean to establish them;—you do it with care in English appeals—but with respect to Scotch causes, I never saw any one sit upon that woolsack who did not think that he was called upon to act very carefully and cautiously, and clearly, in laying down general principles, or acting upon general principles not expressed in judgment, that should regulate questions of Scotch title. As to the principles upon which these deeds are to be construed,—if the author of such a deed said—'I give to John and his heirs-male';—and in the next line he should say—'I mean by the words 'heirs-male,' 'the heirs-male of 'the body,' it would be difficult, upon any doctrine or any principle that I have heard of, to say, he did not effectually destine to 'heirs-male of the body.' So the nature of the subject purchased may affect the construction of such words. If a man, having landed estate, purchases an accessory subject, whatever the words are by which he takes that subject to his heirs, you have been told it will go to that series of heirs to whom the other property is destined. A great many cases have been put in argument which go the length of contending, that where a man by a deed limits to A and the heirs-male of his body, and then to B and 'his heirs-male,' with remainder to his own lawful and nearest heirs-male whatsoever, and then, by another deed of even date, expresses himself to have limited to B, and the heirs-male of his body,—the effect of the latter deed will give a construction to the words 'heirs-male' in the former. Those cases were put, as cases in which it might be well contended, that the author of the deed had given explanation enough of his deed to authorise the Court to say, that that intent expressed in such words, though in another deed, could be legally carried into effect. My opinion upon that I do not state; but I have expressed an opinion, that a declaration plain in the same deed, notwithstanding any thing I have heard urged to the contrary, may have such an effect. My Lords, these who were to answer Sir Ilay Campbell and myself, I must say answered us upon paper a little better than we answered them,—they gave an answer to what was observed by us upon an

very famous passage, quoted from Sir Thomas Craig : it was quoted too repeatedly in this case. ' He puts the case, of an entail made ' to A, *et hæredibus ex ejus corpore masculis* ; and then to B, *et hæredibus ex ejus corpore masculis* ; and then to C, *et ejus hæredibus masculis* ; quibus omnibus deficientibus, hæredibus dicti Titi, sive primæ personæ masculis quibuscunque.' It was contended upon the text of that author, that he meant precisely the same species of heirs under the words '*hæredibus masculis*' of C, as he did under the words '*hæredibus ex ejus corpore masculis*' with respect to A and B ; and this instrument of Linplum having been executed about 1748, we contended on our part, that the expressions ' heirs-male ' of Alexander really meant the same heirs as Craig meant, though it was said that there was a great deal more of nicety and attention to technical phrases in modern conveyances than there was in ancient deeds or ancient writers. I cannot take upon myself here to say to your Lordships how that is in point of fact ; and indeed I think it would be a very dangerous thing to attempt to state, if I knew more of the fact, what stress your Lordships ought to lay upon such a fact in construing this Roxburghe deed. One thing is quite clear, that all the old investitures of this estate, from fourteen hundred and odd, had most technical limitations to the heirs-male of the body. It is consistent with that fact, that both expressions might be used to signify the same description of persons ; but it is a clear fact, that those who so describe the heirs-male of the body, knew technically how to do it, not only in 1648, but for at least two centuries before, as appears from the settlements of this family.

" Your Lordships will find, in the printed case of the respondent in the Linplum cause, that we were told, that a single observation might be sufficient to strip the appellant of the aid she endeavoured to draw from Sir Thomas Craig ; for if, according to the ideas that were in his times entertained of tailzied succession, ' heirs of the body ' could only be called in such a settlement, then, no doubt, the two terms of heirs-male, and heirs-male of the body, must, in respect to deeds of that sort, have been synonymous ; and this admission is far from an immaterial one. It goes a long way to admit a case in which ' heirs-male ' would be flexible in construction ; but it was observed that very different ideas were now entertained ; and that the distinction between ' heirs-male ' and ' heirs-male of the body ' was as well understood, and as generally known as that between heirs and heirs-male. But, my Lords, ' heirs,' by context, may mean ' heirs-male.' We insisted, that the act of 1685 itself furnished an instance of the flexibility, not perhaps of the term ' heirs-male,' but of that term ' heirs ;' and that that was furnished by the clause which, your Lordships will recollect, forms a part of it : ' That if the said provisions and irritant clauses shall not be repeated in the rights and conveyances whereby any of the heirs of tailzie shall bruik or enjoy the tailzied estate, the said omission

1810.

KER, &c.
v.
INNES, &c.

1810.
 ———
 KERR, & C.
 v.
 INNES, & C.

'shall import a contravention of the irritant and resolute clauses against the person and 'his heirs' who shall omit to insert the 'same, whereby the said estate shall *ipso facto* fall, accresce, and be 'devolved to the next heir of tailzie.'

"To this it was answered, and very properly answered, that the word 'heirs' there, is of itself a more flexible term, as it certainly is, than 'heir-male,' if heir-male be a flexible term; and that the word 'heir' must receive its construction from the context; and as to the effect of any entail which was to be registered, if it was an entail to A and the heirs-male of his body, and then to B and the heirs-male of his body, and then to C and his heirs-male, and then to D and his heirs-male whatsoever—then the word 'heir' in the statute would suit and accommodate itself, *referendo singula singulis*, to the sense in which it was necessary to understand it, regard being had to the different series of heirs through whom, from the heirs of tailzie, the estate was to pass; and the worth of the observation on our part certainly was not considerable.

"My Lords, It was further stated in the printed case, that in that proceeding which was had when the Marquis of Tweeddale was declared to be entitled to the estate till he had a second son of fourteen, the Lord Ordinary's interlocutor found, 'That the deeds of entail upon which the question in debate arose, were not devised upon any regular or uniform plan, and so must be taken as Sir Robert or his writer had chosen to express them.' Now, that is the principle of the decision which my Lord Ordinary had embodied in his interlocutor. Is that the language of a man who was prepared to say, that if there was a regular and uniform plan in the instrument, in construing the words of the instrument, he would pay no attention to it? Is it the language of a Judge, who had before him a settled, inflexible, unbending rule of law, known to him and his brethren, which could not be affected by any plan or form of instrument, however regular or uniform? No, my Lords, the *ratio decidendi*, as far as his judgment goes, is directly the contrary. The respondent then further said, that if the intention was to prevail over the words, the appellant's claim to the succession, taken upon the question of intention, was ill founded; for she would be obliged to make out, that the author of this deed intended, having given an estate to the second, and other sons of the Tweeddale family, and the heirs-male of their bodies,—having passed over the father and the elder brother of Alexander Hay, and given an estate to him and his heirs-male, Alexander, the second son, having a third, fourth, and fifth brother, three or four younger brothers, it is not material how many,—that it was the intention of the author of the deed, although they might take as his heirs-male, to pass them all over,—to pass every one over, though he had not substituted them *eo nomine*, as he had substituted the third, fourth, fifth, and sixth, and other sons, in the preceding destinations; and that he not only

meant to pass over them, and to let in before them Hay of Belton, and his lawful heirs-male, and Hay of Lawfield, and his lawful heirs-male, and Lord Robert Ker, the second son of the Duke of Roxburghe, and his lawful heirs-male; but with a priority to the younger brother of Hay of Belton, to let in Hay of Lawfield, and his heirs-male, and with a priority to the younger brother of Hay of Lawfield to let in Lord Robert Ker, the son of the Duke of Roxburghe, and his heirs-male generally; and to let in the whole females who were to succeed, with a priority to the younger brothers of Alexander Hay of Drummelzier, Hay of Belton, and Hay of Lawfield.

“ My Lords, I beg your Lordships' attention to a reason which was then stated, and which was much relied upon at that time, which has a very strong bearing upon the present case. In the construction of instruments, it is one thing, by construction, to include persons who may be intended to be included, though not named, and another thing, by construction, to endeavour to exclude those who might not be intended to be excluded. In the case of Hay of Drummelzier, this House adopted a construction, which imputed to the author of the deed, the intention which it was natural the author of that deed should have, which did not exclude the younger brothers of Alexander, which did not exclude the younger brothers of Hay of Belton, which did not exclude the younger brother of Hay of Lawfield. Your Lordships will pause, I think, before you look upon that as an authority binding you to a construction, which certainly does not *absolutely* exclude the heirs-male of the bodies of Lady Jane Ker's three younger sisters, but which in fact leaves them little chance of ever taking the estates beneficially.

“ My Lords, Did the counsel who argued that case of Linplum suppose, that if there had been a substitution of Alexander's brothers one after another, the decision would necessarily have been the same upon the words ‘ his heirs-male.’ Mark, my Lords, their expression as to this point. ‘ To suppose that Sir Robert Hay intended to prefer to the younger sons of Hay of Drummelzier, not only Hay of Belton, Hay of Lawfield, and Lord Robert Ker, but even the heirs-female of their bodies, and, in like manner, to prefer Lord Robert Ker, and the heirs-female of his body, to the younger brother of Hay of Belton, who still exists, and the younger brother of Hay of Lawfield, who then existed, is altogether improbable;’ whereas, upon the footing of his meaning to prefer all the younger sons of the family of Drummelzier, in their order, to the other families of Belton and Lawfield, &c. your Lordships will perceive an obvious and satisfactory reason for the difference observed between the younger sons and brothers of the Marquis of Tweeddale, and the other substitutes. *The former were called separately and seriatim: it would therefore have been absurd to call their heirs-male general; and it sufficed to call only the heirs-male of their bodies. But in the other substitutions, where only one of a family*

1810.

KER, &c.

v.
INNES, &c.

1810.

KERR, & CO.
v.
THOMES, & CO.

was named, it was necessary to call their heirs-male genera which, of course, failing male issue, would carry the estate to the brothers. It is no doubt true, that, by so doing, the succession might have been carried beyond the brothers. It certainly might and that prompts me to state to your Lordships now, that, which may have an effect upon this case. It is certainly very true, that although William, the elder brother of Alexander Hay of Drummelzier, was excluded, as far as express nomination of others could exclude, from this settlement; and although it is equally true, that the father of Alexander Hay was also excluded; and though it was also true, that the Marquis of Tweeddale was not intended to take; and equally true, that William Hay was not intended to take; the persons who were not intended to take, in certain events, might become the heirs-male of Alexander of Drummelzier, the second son. Admitting that to be so, the argument proceeded to contend that there certainly was a strong ground for saying, that 'lawful heirs-male' here meant 'heirs-male of the body;' but as to this we were told that we must take the whole of the instrument together; and if we find stronger, or as strong grounds, on the other hand, for saying, that it was the intention of the author of the deed to use these terms 'lawful heirs-male' in their general sense, we will interpret them in their general sense. The sons of the Marquis of Tweeddale have been called *eo nomine*, with the lawful heirs-male of their bodies. It might undoubtedly, by possibility, have happened, that they should all have failed before the author of this deed, and that Alexander himself might have died;—that his younger brothers might have died;—and then that, contrary to the expectation of the author of the deed, his elder brother, William, might have taken. But you cannot, because you see, that the execution of the intention of the author of the deed might operate a surprise in some cases which may happen, you cannot therefore say, you will refuse to execute his intention in a case in which he has plainly stated his intention. You cannot refuse to execute his general intention plainly stated, because his expressions, in some possible or particular events, may be suspected by you to go beyond what he thought they might actually reach. The true question upon the instrument in the Linplum case was this, Whether it was made so clear, by reasoning upon the fact, that persons excluded as substitutes would be included as heirs,—by reasoning upon the word 'descendants,'—and by reasoning upon the other topics that led to all the material observations, whether it was made so clear that he meant to exclude all the younger brothers of Alexander of Drummelzier,—whether it was made so clear that he meant to exclude Hay of Belton's younger brother, and Hay of Lawfield's younger brother, that you would venture to exclude them, by narrowing the terms, and the sense of the terms, under which they might be included, and, *prima facie*, were to be taken to be intended to be included.

“ My Lords, I admit, that it is a dangerous rule of construction of instruments, which construes them by reasoning upon events as improbable, which the author of this deed has himself provided for. —I will put your Lordships in mind of the arguments at the Bar, as to the utter improbability of the author of this deed of 1648 having in his meaning any person but the eldest daughter. It was urged, that he, offering these four young Ladies to Drummonds and Flemings, could not think it possible that they should not come together ; —that it was quite absurd to suppose that he could imagine, that some or other of them should not marry some one or other of these Ladies, and have issue-male of their bodies ;—that therefore he could have actually meant nothing more than a sort of verbal compliment, in this destination, to the eldest daughter. I need not enlarge upon that ; but your Lordships will remember the amazing number of cases that were put, upon the improbability that any man, possessed of his understanding, should suppose, that the author of the deed could have looked at them as possible cases ; yet I shall satisfy your Lordships hereafter, from the express words of the deed, that all these improbable things are not only contemplated by the author of the deed of 1648, but are, *totidem verbis*, described and provided for in that deed.

“ My Lords, There was then an admission, on all sides, in the Linplum case, that ‘ heirs-male ’ might mean heirs-male of the body in a particular clause of the Linplum deed. The deed provides, ‘ That it shall not be leisome nor lawful to the second son to be ‘ procreate of the said Marquis, or the lawful heirs-male of his,’ nor ‘ to any of the said heirs of tailzie, nor their descendants, to alter, innovate, or change the destination. To this part of it, it was answered truly, that heirs of tailzie would take in both the person who was named as the heir, and every species of heir, who from him was to derive title to the estate. But there is also this clause, that when the second son of the Marquis of Tweeddale, Hay of Drummelzier, or Duke of Roxburgh, comes to the age of fourteen, that then the right to the lands and others foresaid shall fall and devolve to his said second son, and to ‘ his heirs-male,’—‘ and so on as often as ‘ the same case happens.’ Now, when your Lordships recollect, that the second son of the Marquis of Tweeddale was to take ‘ to him, and his heirs-male of his body lawfully begotten ;’ and when you recollect, that the second son of Hay of Drummelzier was to take ‘ to himself and his heirs-male,’ without the words, ‘ of his body ‘ lawfully begotten,’ and that the second son of the Duke of Roxburgh was to take to him, and ‘ his heirs-male,’ without one word of whose body they were to be procreate ; I beg leave to ask, whether you are not compelled by the context to say, that ‘ heirs-male ’ of the second son of the Marquis of Tweeddale means ‘ heirs-male of the body ;’—that ‘ heirs-male ’ of the second son of Hay of Drummelzier means ‘ heirs-male general ;’—and that the ‘ heirs-

1810.

KER, &c.
v.
INNES, &c.

1810.
 ———
 KER, &c.
 v.
 INNES, &c.

male' of the second son of the Duke of Roxburgh means 'heir male general' also ;—that they are flexible terms, therefore, being in construction, the very same words signifying different species of heirs-male, by referring to different destinations for the meaning of the words, as they apply to each ;—this Linplum deed itself, therefore, (the case which has been supposed to establish inflexibility the sense of the words), proving that they are flexible terms ?

“ That incontestably proves the same point which I observed to follow from another passage, that ' heirs-male' may be used in an instrument to signify heirs-male of the body,' in respect to one, and ' heirs male in general' as to another person ; but clearly, that the words *may* mean heirs-male of the body. When I say that the *may* so mean, I do not say they *must* so mean ; that is quite a different thing. Heirs-male here, in the clause cited, must mean ' heirs-male of the body,' as applied to one person, and not ' heirs male of the body,' as applied to another ; and the flexibility of the term cannot be more clearly proved than by such an observation as this. There is precisely the same thing to be observed, if you will look back to the bond of tailzie by Hary Lord Ker, on the 18th of July 1640, where it is said, ' The second son procreate of the marriage shall succeed to the lands, baronies, and others specially and generally mentioned, and be provided thereto, who shall take upon him the surname of Ker, and carry and bear the name and arms of the hous of Cessfurd ; and that he and ' his heirs' (that is, such heirs as were to take,) ' shall continue to bear the said surname and arms.'

“ My Lords, With respect to this case of Linplum, I take it to have established merely this, which I think it does not need any case to establish, that the heirs-male may mean, and generally do mean, heirs-male general ;—that in construing a deed in which there is a question as to the true intent of the author of that deed, you are to adhere to that as the intent which is the *prima facie* obvious meaning of those words, unless you are, by fair reasoning,—by strong argument,—by that which amounts to necessary implication or declaration plain, driven out of the obvious meaning, and unless you can satisfy yourself, that the author of the deed did not intend that such should be taken to be the meaning of the words he has used, and unless you collect, (I think I may safely add that, and I abstain from going further), that that is not the meaning of the language of the author of the deed, from what the author of that deed has himself, by the deed, told you is the meaning of his language.

“ My Lords, Having gone through this case, your Lordships will permit me to say, it is not, in my opinion, a case which proves, that the word ' heirs-male' is necessarily, in every deed in which it occurs, an inflexible invariable term. Previous decisions do not, at least none which have been cited to us, seem to have amounted to a de-

termination that the term was so inflexible. The case of Baillie *versus* Tennant, upon which the judges seemed to have placed great reliance in the Court of Session, arose under a will, or an instrument in the nature of a will, made by a person of the name of William Walker. It bore date on the 7th May 1752. He says, for the love, favour, and affection I have and bear to my sister and her children after named, upon whom I am resolved to settle my real estate, and to prefer them thereto next after the issue of my own body, in the order of succession, and in the terms, and under the conditions under written, and for divers and sundry causes and considerations me hereunto moving; wit ye me to have given, granted, and disposed, likeas I, with and under the burdens, reservations, and conditions after specified, by the tenor hereof, give, grant, and dispose, to myself in liferent, and to the heirs-male of my body; whom failing, to the heirs-female of my body in fee; whom failing, to my sister Isabel Walker, relict of John Tennant of Handaxwood, now spouse to Thomas Baillie of Polkemmet, writer to the signet, in liferent, for her liferent use allenarly, in case she shall happen to survive me, and after her decease, to Alexander Tennant, my nephew, eldest lawful son to my said sister, and procreate betwixt her and the said deceased John Tennant, and *his heirs or assignees, in fee*; whom failing, to William Baillie, eldest lawful son to the said Thomas Baillie, procreated between him and my said sister, his heirs or assignees, also in fee; whom all failing, to my own nearest and lawful heirs and assignees whatsoever.

"Now, my Lords, the question that arose in that case between the parties, arose in consequence of the following circumstances having taken place. After the death of Mr. Walker, Colonel Alexander Tennant, the first substitute, entered into possession. He died without a settlement; and then a competition arose between his sister and heir at law, Mrs. Agnes Tennant, and the next *nominatum* substitute, Mr. William Baillie; the former contending, that the word 'heirs' in Mr. Walker's instrument ought to be taken in its proper and technical sense, to signify heirs general; the latter, that it ought to be restricted, from the presumed will of the maker of the deed, to heirs of the body. The Court of Session thought so; but this House reversed their judgment; and I take it, that what is laid down in that judgment of reversal amounts to neither more nor less than this, that the author of that settlement professed regard to two children after named; that he had made a disposition to the first of them, his heirs and assignees, and failing them, to the other, his heirs and assignees. Your Lordships will take notice, that here is nothing in the terms of this settlement which looks like a succession to be enforced by prohibitory, irritant, and resolute clauses; nothing of context in the destination itself; nothing of declaration of limited meaning to be found in the other provisions of the deed; nothing but a destination to the first, his heirs and assignees, as dry

1810.
KER, &c.
v.
INNES, &c.
Case of
Baillie v.
Tennant.

1810.

KER, &c.
v.
INNES, &c.

as a destination to Lady Jane Ker and her heirs-male, without more would be ; nothing like a clause describing the person to take, with reference to marriage, or any other of the circumstances which you have heard commented upon in the present case, and in the *Linplum* case. The case is only this : A person standing in a relation to two individuals, for both of whom he professes a regard, executes a settlement, by which he gives to one the whole fee, (I do not pledge myself to accurate expression), and disposes, in the event of his having no heirs, to another : that is the extent of it ; and if he does choose to give the estate in terms, which *prima facie* import large an interest, would it not have been too dangerous to say, that merely because it would have been a much more reasonable thing for this man, to have limited it over to the sister, than to have suffered it, under the effect of the first destination, to go to a stranger, because he was the heir to the brother, because that would have been more rational ? Would it not have been too bold for a Court to have declared it to be his intent, that it should not go to the heiress though he has not made use of a single syllable to manifest plain that he had formed such an intention ? The House of Lords did not think itself at liberty to carry into effect a meaning which the House thought more rational than that which the author of the deed had thought proper to express. The House did not think he had sufficiently expressed that more rational meaning. That this case, in any way of considering it, should be deemed authority for the case of *Linplum*, to the extent of taking that case of *Linplum* to amount to a decision, that, in whatever context those words ' heirs-male ' are found, in whatever company they are found, they shall mean ' heirs-male general,' and cannot mean ' heirs-male of the body,' is really a proposition to which I cannot, after considering this a great deal, feel myself able to assent.

Case of Ball
v. Coutts.

" Your Lordships have had another case also mentioned as bearing upon this subject, which, I own, appears to me to have no manner of relation to it : it is the case of *Mrs. Coutts*. I think it is stated in General Ker's case. It is represented thus : The niece of Mrs. Coutts had married a Mr. Ball, by whom she had a son named James. She was afterwards, however, compelled to divorce her husband, who went abroad, and had no further connection with her or her friends. Mrs. Coutts executed a settlement, by which she conveyed her property to trustees, for various purposes, and among others, to make payment of the several sums of money under written, which she thereby legated and bequeathed to the respective persons after mentioned, and their heirs, executors, or assignees. She then gave to her grand-nephew the sum of £1800 Sterling and with respect to this legacy, she afterwards declared, that, in the event of the decease of the said James Robert Coutts, her grand-nephew, before majority or lawful marriage, this sum of £1800 Sterling should return, and pertain and belong, to her own nearest

heirs and assignees whatsoever, absolutely exclusive of his father, and of all his relations by the father's side; and that, during the minority of this grand-nephew, this sum of money, and other effects bequeathed to him, should be under the management and administration of her trustees, and the acceptor or survivor of them, and only the interest arising therefrom, so far as they should judge necessary, bestowed and applied for the use and benefit of her said grand-nephew. She then added a codicil in these words: 'If my 'lovely James Coutts should not come home, what money I left to 'him I leave to be divided amongst my nearest relations: plate, 'and other things, I left to my sister Mrs. Crawford.'

"It turned out, that this nephew, upon his return towards England, was lost at sea, a few days before this old lady died; and then this question arose, Whether, under this will, his father, as his heir-general, I think, was to take this legacy of £1800? Now, of the principles upon which the Court of Session decided, as they did, that the father was to take, I am not able to give your Lordships any account. In this country, your Lordships know, that although you may give a sum of money to the heir or executor of a person who predeceases you, it requires especial words to do it. In the next place, this lady had said, if he did not come home, this sum of £1800 was to go to her own nearest relations. The Court of Session, I suppose, construed the will and codicil thus, or in some such way: that because the lady thought the nephew was living, and to come home, the nearest relations were not to take; but inasmuch as he was dead at that time, they thought that the codicil did not apply to the nephew, who was dead at the time of the codicil being made, but was to be construed with reference to the idea that he was alive at the time; because that idea was supposed to affect the testatrix's mind at the time of making the codicil. They seem further to have held, that the clause as to his attaining the age of majority, or lawful marriage, was a clause not of much effect; and they said, as I understand the case, that that part of the will which gave it to him absolutely, would carry it over to his heirs, executors, and administrators, and that his father could not be excluded. Take this decision in that case to be quite right, how does that case apply to the subject before you? How it should prove, that in no clause,—in no context,—in no deed,—the words 'heirs-male' can have a limited signification, it requires a person of infinitely greater powers than those of the person who now addresses you to point out.

"My Lords, There were two cases very much relied upon on the other side, one the case of the Earl of Ross, which, on looking into the terms and language of it, I do not find to justify me in taking up much of your Lordships' time. The other is the case of the Earl of Dundonald *versus* the Marquis of Clydesdale, in reference to the Earl of Dundonald's estate, which proves no more than this, which dale may be proved in almost every instance you look into that the

1810.

KER, &c.
v.
JAMES, &c.

Case of the
Earl of Ross,
and Case of
Earl of Dun-
donald *v.* Mar-
quis of Clydes-

1810. words 'heir-male' may signify 'heir-male of the body.' The en-
 tail is in these words : ' We John Earl of Dundonald, being fully
 KERR, &c. ' determined, failzieing *heirs-male of our own body*, or '*heirs-male*
 v. ' of any of the descendants of our own body, to settle the succession
 INNER, &c. ' of our estate in one person, and that the same may not be divide
 ' by the succession of heirs-portioners, do hereby bind and oblige us
 ' and our heirs of line, male, tailzie, conquest, and provision, and
 ' successors whatsoever, *failzieing heirs-male, as said is*, to provid
 ' and secure heritably, and to make resignation of all and sundry
 ' lands, lordships, baronies, &c. to and in favour of our eldest lawfu
 ' daughter, Lady Ann Cochrane, and the heirs-male lawfully to b
 ' procreate of her body ; which failzieing to Lady Susannah Coch
 ' rane, and the heirs-male lawfully to be procreate of her body
 ' which failzieing to Lady Catherine Cochrane, and the heirs-mal
 ' lawfully to be procreate of her body, our third and youngest lawfu
 ' daughter ; which failzieing, to our other daughters to be procreat
 ' of our bodies *successivè*, and the heirs-male of their bodies ; whic
 ' failzieing, to our other heirs-male whatsoever ; which all failzieing
 ' to our other nearest heirs and assignees whatsoever.'

" Upon the death of Earl John, he was succeeded by Earl Wil-
 liam. Earl William being his son, was of course, your Lordships
 observe, his descendant. He died without issue in 1725 ; and then
 the Marquis of Clydesdale, the eldest son of Lady Anne Cochrane,
 on the one side, claimed the estate, and on the other side, Thomas
 Earl of Dundonald, who was heir-male general of Earl William.
 Now, if your Lordships will give your attention to a phrase here, I
 think that it cannot be considered as clear, which has been confi-
 dently said, that this narrative part of the deed was necessarily set
 right by the positive part of the deed, containing the destinations,
 attending to the circumstances and events in which the destinations
 were to take place ; and perhaps it will be found, that it will be ex-
 tremely difficult to support this decision, unless you are to support
 it by looking to the effect of the context upon these very words
 ' heirs-male.' Your Lordships will give me your very particular
 attention to every word of it. ' We John Earl of Dundonald, being
 ' fully determined, *failzieing heirs-male of our own body*, or *heirs-*
 ' *male of any of the descendants of our own body.*' Now, here are
 the words ' heirs-male of our own body,' used by one who knew how
 to make use of them, because he has used them, and there follow
 instantly upon them, or ' heirs-male of any of the descendants of
 ' our own body.' Well, said Thomas Earl of Dundonald, I am heir-
 male of William, and William was heir-male and descendant of
 your own body, and therefore Lady Ann ought not to take. No,
 said the other party, that is not so ; this is only a narrative of his
 purpose : when he executes his purpose, the person to whom he
 gives is Lady Ann Cochrane. But how does he give to Lady Ann
 Cochrane ? he gives to her in this way, ' to settle the succession of

‘ our estate in one person, and that the samen may not be divided
 ‘ by the succession of heirs-portioners, we do hereby bind and oblige
 ‘ us, and our heirs of line, male, tailzie, conquest, and provision, and
 ‘ successors whatsoever, *failzieing heirs-male, as said is,*’ to provide
 and secure heritably, and to make resignation of ‘ all and sundry
 ‘ lands, lordships, baronies, &c. to and in favour of our eldest lawful
 ‘ daughter Lady Ann Cochrane.’ Then, might it not be very well
 said, that the author of this instrument did not himself provide for
 the daughter till there was such a failure of heirs-male as he men-
 tions. He gives it, ‘ failzieing heirs-male as aforesaid.’ ‘ *Heirs-*
 ‘ *male aforesaid,*’ may be taken to be ‘ heirs-male of the body,’ or
 ‘ heirs-male in general of the descendants of the body ;’ and if the
 obvious meaning is to be given to the latter words, which, it is ad-
 mitted, ought *prima facie* to be given, then why will not those
 words, ‘ failzieing heirs-male as aforesaid,’ *reddendo singula singulis*,
 mean, failing ‘ heirs-male of his body,’ and failing ‘ heirs-male gene-
 ‘ ral’ of the descendants? I apprehend it is then by taking the
 whole of the words together, the whole of the deed together, that
 this is explained; the obligation upon heirs to resign, being an
 obligation placed upon them only ‘ failzieing heirs-male as aforesaid.’
 When a decision was made in favour of Lady Ann, it implies, or
 seems to imply, that the Court of Session did not think these words,
 ‘ heirs-male of any of our descendants,’ necessarily inflexible.

1810.

KER, &c.
 v.
 INNES, &c.

“ I will not trouble your Lordships with going through that case Limited sense
 more at length ; but I will proceed to beg your Lordships’ attention in which the
 once more to this deed of 1648, which I have so frequently been deed 1644 may
 obliged to trouble your Lordships with hearing stated with a great be looked at.
 deal of particularity ; but, before I do so, I will refer your Lordships
 also once more to the deed of 1644 ; I say not for the purpose of
 construing the deed of 1648 by the deed of 1644 ; but your Lord-
 ships have a right to look at the deed of 1644 precisely for the same
 purpose as you look at the deed in the case of Linplum, and the
 deed in the Dundonald case. You cannot argue from the intention
 of the person in one deed, that he must have the same intention
 when he executes another ; but you may collect from the phraseology
 and language of different instruments what is the meaning of lan-
 guage in deeds ; and you may learn thus, that in the law-language
 the same intention is sometimes expressed in the same terms—in
 terms partly different—or in terms perhaps altogether different.

“ My Lords, In that deed of 1644 there are, I think I may ven-
 ture to state to your Lordships, near ten instances in which the
 words ‘ heirs-male’ and ‘ heirs’ have not, and cannot have their
prima facie sense ; for they are deprived of that *prima facie* sense
 by the context in which they occur. I think it is a difficult proposi-
 tion for any man, who will apply his mind to this subject, to make
 out, that the author of a Scotch deed of this kind cannot say in that
 deed, that he means by ‘ heirs-male,’ heirs-male of the body. Then

that in caice it sall happine, ather the
and designit to succeed to us, as said
namitt with whom they are appointit to
this lyffe, or to be married before
them; thane, and in that caice, the per-
son lyffe, *being married to personnes of*
to be free of that pairt foresaid of the
marriage, and notwithstanding heir of, to
before exprest, they always keipand, ob-
the remainent conditiones befor and after
es; and in caice it sall happine all the fore-
ularlie befor namitt, appointed to succeed to
ed, to depairt this lyffe without aires-maill
awne bodies on lyffe, they maring as said is;
all fail in the observing and fulfilling of the
and after mentionat set down to be performit

1810.

KER, &c.
INNES, &c.

And, your Lordships here see, that the author of
had got into his head, that that might happen which
as an impossibility, that these ladies should none of
the Drummonds or Flemings; and he says, that then,
puts, they are not to lose the benefit of this tailzie.
he further say upon that? That the gentlemen are to
of this tailzie, unless they marry ladies of honourable
descent. He lays upon them precisely the same condi-
respect, as upon the daughters of Lord Hary Ker after-
although the limitation of 1648 is only a limitation to
their spouses, and the heirs of their body; yet there is a
that deed also, which supposes that none of them may
of these daughters, and, in the cases put, provides they
lose the benefit of the tailzie, putting it, however, upon them,
persons of lawful descent and honourable quality, and in
deed, if they so marry persons of lawful descent and honour-
quality, is there any *express* limitation whatever to their heirs-
or heirs of their bodies. Yet your Lordships will hardly say,
the intent of this was to make the Drummonds and the Flem-
marry ladies of quality and honourable descent, and yet to give
benefit whatever to their heirs; or if any was intended to be given
their heirs, it was not intended for the heirs of the marriage, as
heirs of their bodies; but they could take none, save by impli-

If your Lordships look at the clause in the deed of 1648, you
and it runs thus: 'And sicklyke it is providit, that in caice it
happen all the foresaides persons to whom our saids aires of
is *respective* are appointit be us to be married to depairt this
or be all married, before the said aires of tailzie *respective* sall
to succeed to our said estate, and living.' Here, then, the au-
of this deed puts this very case, that these Ladies may be all

1810.
 ———
 KER, &C.
 v.
 INNES, &C.

if you can make out that he *can* effectually, in express and dire language, say, that he means 'heirs-male of the body' by the term 'heirs-male,' why may he not sufficiently manifest the same purpose by any other words equal to that effect—by any other context which proves that he meant 'heirs-male of the body,' where the term 'heirs' are followed by the word 'said,'—by the word 'after said,'—by the words 'herein before nominate,'—'herein before provided,'—'called to the succession,'—including or omitting in the phrase the word 'male';—these are all so many instances of the context giving to those words a construction which, without such context, would not belong to them.

"My Lords, There is a passage in this deed of 1644 which I do not remember to have been much observed upon at the Bar; and I presume to ask your Lordships to listen to it, because there is a similar passage in the deed of 1648, each of which appears to me a passage of very considerable weight in the consideration of this case. Your Lordships recollect the manner in which the destinations were made in the deed of 1644, to the Drummonds marrying these ladies—to the Flemings marrying these ladies—and the heirs of those Drummonds and Flemings,—the heirs of their bodies;—and it has been admitted, and I think full as broadly admitted as it could be, and I think more broadly than I should have admitted it if I had argued this case, that, by the deed of 1644, the heirs of the bodies of the Drummonds and the Flemings (if the Ladies Kers had died without issue, after they had once performed the condition by marrying them) by any other wives would have taken—I think that doubtful under the deed of 1644. It is clear, under the deed of 1648 that would not be so. The clause in the deed of 1644 I proceed to read to your Lordships. Allow me, before I read it, again to observe how dangerous a way of proceeding in judgment we should establish, if we were to listen with as much attention as is asked of us, to all those curious, hypothetical, nice, improbable cases that are put at the Bar, that it never could be in the contemplation of the author of these deeds, that the Drummonds and Flemings should have so little taste, as not to attach themselves to these ladies, and that it was not to be supposed that these Flemings, from the second to the tenth sons, should not like a wife among those ladies with a very large fortune—that it could not be in nature, that these ladies themselves should not be so attached to the Drummonds or the Flemings as to marry them—and that it was not to be supposed that these ladies should all die without issue; and that therefore this clause of destination to the eldest daughter was nothing more than a complement to Lady Jane Ker, to make her, as it were, the conduit pipe through which this estate was to get back to the heirs-male of the author of the investiture.

"My Lords, Let us see, as to all this, what is the opinion of the author of the investiture himself. The clause is as follows: "It is

' heirby expressie provyded, that in caice it sall happine, ather the
' foresaides personnes nominate and designit to succeed to us, as said
' is, or the personnes above namitt with whom they are appointit to
' matche, all ather to be departit this lyffe, or to be married before
' the said succession fall to them; thane, and in that caice, the per-
' sonnes nominate and being on lyffe, *being married to personnes of*
' *honori and lawful descent*, to be free of that pairt foresaid of the
' conditionn of the said marriage, and notwithstanding heir of, to
' succeed to us in manner before exprest, they always keipand, ob-
' servand, and fulfilland the remainent conditionnes befor and after
' spect, and na otherwayes; and in caice it sall happine all the fore-
' saides personnes particularie befor namitt, appointed to succeed to
' us in manner foresaid, to depairt this lyffe without aires-mail
' lawlie gottin of yr awne bodies on lyffe, they mareing as said is;
' or itt give they sall all fail in the observing and fulfilling of the
' conditionnes above and after mentionat set down to be performit
' be them.'

1810.

KER, &c.
v.
INNES, &c.

"Now, my Lords, your Lordships here see, that the author of
the deed of 1644 had got into his head, that that might happen which
we have heard of as an impossibility, that these ladies should none of
them marry these Drummonds or Flemings; and he says, that then,
in the cases he puts, they are not to lose the benefit of this tailzie.
But what does he further say upon that? That the gentlemen are to
lose the benefit of this tailzie, unless they marry ladies of honourable
and lawful descent. He lays upon them precisely the same condi-
tions in this respect, as upon the daughters of Lord Hary Ker after-
wards: and although the limitation of 1648 is only a limitation to
them and their spouses, and the heirs of their body; yet there is a
passage in that deed also, which supposes that none of them may
marry any of these daughters, and, in the cases put, provides they
shall not lose the benefit of the tailzie, putting it, however, upon them,
to marry persons of lawful descent and honourable quality, and in
neither deed, if they so marry persons of lawful descent and honour-
able quality, is there any *express* limitation whatever to their heirs-
male, or heirs of their bodies. Yet your Lordships will hardly say,
that the intent of this was to make the Drummonds and the Flem-
ings marry ladies of quality and honourable descent, and yet to give
no benefit whatever to their heirs; or if any was intended to be given
to their heirs, it was not intended for the heirs of the marriage, as
the heirs of their bodies; but they could take none, save by impli-
cation.

"If your Lordships look at the clause in the deed of 1648, you
will find it runs thus: 'And sicklyke it is providit, that in caice it
' sall happen all the foresaides persons to whom our saids aires of
' tailzie *respectivè* are appointit be us to be married to depairt this
' lyffe, or be all married, before the said aires of tailzie *respectivè* sall
' fall to succeed to our said estate, and living.' Here, then, the au-
thor of this deed puts this very case, that these Ladies may be all

1810.
 —————
 KER, &c.
 v.
 INNES, &c.

married before the succession falls, so that a Drummond or a Fleming could not tender their hands to them. 'In that caise, the
 'sonnes and 'airis' *respectivè* nominate be us in manner for
 'are hereby declarit be us, naways to amit, bot to have and
 'the benefit and right of tailzie and succession, they always
 'ing persons of honourable quality and lawful birth, and w
 'keipand, observand, and fulfilland the remanent otheris conditi
 'provisions, and restrictions before and after mentionat, an
 'otherwise.'

"Now, is it possible to deny, that the author of this deed contemplated the case, that these Ladies might be all so disposed of these Gentlemen could not comply with the condition of marrying them? and yet he imposes upon them the condition of marrying sons of honourable condition and quality; and then says, they enjoy the benefit of tailzie, the right of succession. I found upon this observation, that if the author of this deed has given to Ladies and their heirs-male, however the term is understood, *seriatim*, the benefit of succession, in case they did marry persons of honourable quality and lawful birth, not the specially designated of tailzie; and if the author of this deed has given to these Gentlemen *seriatim* the benefit of tailzie if they could not marry Ladies, then the author of the deed has in fact contemplated two cases; one, that the Ladies might marry;—the other, that they might not marry, these heirs of tailzie named Drummond and Fleming; and that he did not act upon a presumption, that the eldest daughter would assuredly marry one of these heirs of tailzie. Can your Lordships be justified, when you come to interpret the clause of destination, to argue, by assuming, that he never thought of those events so improbable might happen, as that the eldest daughter should not, or as that none of these daughters should happen to marry a Drummond or a Fleming; and therefore has not provided for such events. He has expressly described in his deed of destination the events such as these. In that instrument, he has destined the benefit of succession in case the daughters marry the specially-named heirs of tailzie, or the heirs-male of the bodies of the daughters *seriatim*. Connected with a condition about marriage, he has, in another event, in the same instrument, not in express terms indeed, destined the benefit of succession to the daughters *seriatim*, as I think, and their heirs-male, but in a phrase capable of a plural meaning, and demanding construction 'to the eldest dochter and their heirs-male.' like the limitation in the Linplum case to Alexander Hay of Drummelzier, not expressly naming younger persons, *seriatim*; in which case it was admitted at the Bar, the words 'heirs-male' might be construed 'heirs of the bodies;' but meaning, as I collect from all his expressions taken together, that the younger sisters should take as *substitutes seriatim*, though he does not expressly name them. I ask whether all this does not lay a strong probable ground (when you look at all the clauses which affect the Drummonds, the Flemings

the Ladies, as to the condition about marrying a person of honourable quality and lawful descent), for saying, you get at a declaration plain, from the whole instrument, that they who were required to marry persons of honourable quality and descent, were required to marry persons of honourable quality and descent, because it was the intent of the author of the deed, that the succession should be to the heirs-male of the marriages,—to heirs-male of the bodies of those married?

1810.

—
KER, &c.
v.
INNES, &c.

“ Your Lordships will now permit me to read to you once more this clause : ‘ The right of the said estate shall pertain and belong to the eldest dochter of the said umql Hary Lord Ker, without division, and yr airis-male; she always mareing or being married to ane gentilman of honour and lawful descent, who shall perform the conditions above and under written; qlkis all failzing, and yr said airis-male, to our nearest and lawful airis-male qtsomever.’

“ Your Lordships will have the condescension to permit me to consider myself as speaking to you, as confidently of opinion that this means a *seriatim* succession of the daughters. Then, my Lords, if heirs-male may be applied,—if that term may, and must, in some cases, mean heirs-male of the body, the question is, Whether this expression, ‘ their heirs-male,’ in this place, means heirs-male of the body? Now the limitations, failing the limitations to the Drummonds, and failing the limitations to the Flemings, would then stand thus: To Lady Jean Ker and her heirs-male, she marrying a gentleman of honourable and lawful descent;—to Lady Anna Ker and her heirs-male, she marrying a gentleman of the same description;—to Lady Margaret Ker and her heirs-male, she marrying a gentleman of the same description;—and then to Lady Sophia Ker and her heirs-male, she marrying a person of the same description; and failing the heirs-male of all of them, (I beg your Lordships’ attention to that expression, because I do not mean to state that that is the expression in the deed;—I will state the expression in the deed presently), and failing the heirs-male of all of them, to the heirs-male whatsoever of the author of this deed, Robert Earl of Roxburghe. My Lords, I do not mean to state to your Lordships, that a man cannot make an instrument, containing a succession among sisters and their heirs-male general. It certainly does not often occur that such are made: but there are such. There are instances to be found, where there were successions between sisters and brothers and their heirs-general. I have not information enough to know, whether those I allude to contained all the matter that furnishes observations upon this clause in our deed of 1648; but my Lords, I mark this, that when you are construing the words of an inaccurately untechnically expressed clause of this sort, one sort of construction may belong to such a clause, and another construction may belong to a regular series of limitations, technically, and drily, and precisely expressed in a better-drawn instrument; and there may be

What Heirs-
male mean in
this case.

1810.

KEB, &C.
v.
INNES, &C.

nothing in the instrument itself to affect the obvious meaning of the limitations so expressed.

“ My Lords, The deed 1648, after the destination to the eldest daughter, &c. says, ‘ which all failing, and their saids heirs-male, & ‘ my heirs-male whatsoever.’ Here the word ‘all’ has been ~~con-~~ tended to mean *all the daughters*. On the other hand, it has been said, that it means *all the persons named in the former destinations, and their saids heirs-male*. Be it so, my Lords; but this shows the power of context, and the effect of construing the whole deed together: for then the words ‘heirs-male,’ by force of the word ‘saids,’ mean ‘heirs-male of the body,’ as to the heirs male of the Drummonds and Flemings, whatever they mean as to the heirs-male of the Ladies not marrying Drummonds or Flemings; and therefore ‘heirs-male’ may mean ‘heirs-male of the body.’

“ My Lords, Is it probable that the author of this instrument, considering what he intended respecting his daughters *respectively* in one case, and what he meant as to the Drummonds and Flemings *respectively* in another, is it probable that he meant to say, I give this to you and your heirs-male general,—and afterwards to your sister, and her heirs-male general,—and afterwards to a fourth, and her heirs-male general;—and then to say, if you do not marry a person of such a quality, you shall not have the estate; and if you do marry a person of such a quality, and then do some acts which are prohibited, you shall not keep the estate? What is to be the consequence, if, after so marrying, she contravenes or violates any of the conditions? The consequence is, to take away the estate from her and her heirs-male general, for the purpose of giving it in all probability to the same persons from whom it is taken away, the heirs-male general of the author of the instrument. I beg your Lordships’ attention to this, because we have had it argued, that this is not a case of forfeiture, but that it is a case where a Lady is to capacitate herself, by marrying, to take; and therefore it has been said, that as these Ladies might not, none of them might, capacitate themselves to take, by marrying a gentleman of honourable and lawful descent, it is necessary that the heirs-male of the author of the deed should come in as *his* heirs-male under that general destination; because they would not come in under these daughters, as their heirs-male, not capacitating themselves to take. To those who use that argument I answer, it is not only a case of capacitation to take, but it is a case of forfeiture, too, after they had taken. It is very true, that if none of the Ladies married a Drummond or a Fleming, or a person of honourable and lawful descent, none of their heirs-male could take under this destination; and therefore there might be, in that way, a necessity for the destination to the author’s heirs-male generally. But put the case on the other hand, that they did *every* one marry, one a Drummond, a second a Fleming, and a third another Fleming, and so on. Suppose one of them afterwards sold, or

suffered the estate to be subjected to eviction, (I say nothing as to altering the order of succession), To whom is the forfeiture? What is to be the effect of it? Is it understood to be the clear meaning of these words, that the forfeiture is to carry over the estate to those very individuals who would have taken it if there was no forfeiture? If that is so to be argued, I do not say that this circumstance is decisive, but surely it is very much to be attended to.

“ But there is another very weighty circumstance distinguishing this from the Linplum case, which I do not recollect having heard taken notice of in the argument in this case, nor do I find it in my notes. I am afraid, therefore, in repeating it, I attribute more weight to it than belongs to it; but having given it the best attention I can, I think there is a great deal of weight belongs to it. In the case of Linplum, the limitation was to Alexander, the second son of Hay of Drummelzier, and his lawful heirs-male. What was the object of the construction, that ‘heirs-male’ meant ‘heirs-male general?’ To let in his younger brothers, to let in the younger brother of Hay of Belton, and to let in the younger brother of Hay of Lawfield. But what is to be the effect of this construction here? Your Lordships see, it is to be a construction to exclude, I do not say absolutely to exclude, but almost absolutely to exclude, the younger sisters, until there shall be a failure of these heirs-male general of the elder sisters, for whom you look upwards, for whom you look downwards, and on this side and on that side; and in a family numerous and respectable as those Kers of Cessford, you never could look in vain for them, in all human probability, if you looked to all eternity. The principle of construction we are in this country familiar with, which endeavours to include and not to exclude, to make gift effectual, and not to deny it, would thus, in all probability, have no effect whatever.

“ Then your Lordships will look too at that part of the instrument in which the forfeiture is created; it is to be on the persons failzieing, and the heirs-male of their bodies. I do not say that that, taken by itself, is a circumstance which would weigh very much, because if the words heirs-male, in the subsequent clause, mean heirs-male generally, they are by other words put under the conditions, and the conditions attach upon the heirs-male generally of those substitutes which attach upon the heirs-male of the bodies of the others; yet it is not without its weight, that the author of this deed, meaning to limit to these Ladies and their heirs-male general, and making them take and hold under conditions, should describe them and their heirs-male general, as persons failzieing, and the heirs-male of their bodies,—if this clause is to be construed as affecting them. Further, I cannot help thinking another clause deserves great attention, though I see it has been treated occasionally as amounting to just nothing. It is that with respect to the other landed property. ‘And farder, we have sauld and disponit, and be

1810.

 KERR, &c.
 V.
 INNES, &c.

1810.
 —————
 KER, &c.
 v.
 INNES, &c.

‘thir presents sellis and disponis to our saidis airis of tailzie, successors to our said estate, living, earldom, and lordship foresaid, and the aires-maill lawfullie to be gottin of their bodies, always under the conditions, restrictions, and provisions above specified, qlk are herein halden as exprest, (failzing of aires-maill lawfullie gotten or to be gotten of our awin bodie), all and singular utheris lands, heritages, annualrents, milns, woods, fishings, patronages, tacks, and rights of teinds, reversions, and utheris heritable rights whatsoever, pertaining and belonging to us ; and binds and obliges us and our airis, als well maille as of line,’ (Your Lordships know they might be his heirs-male without being the heirs of the body of those Ladies.) ‘failzing of airis-maill of our awin bodie, as said is, to denude ourselves of the right thereof, to and in favour of our saidis airis of tailzie, successors foresaid, is always under the provisions, restrictions, and conditions above specified, in sik form and manner as sall be devysit.’

“Now, my Lords, this clause could mean nothing, if the intention of it was not to provide, that the *other* property was to go with that which had been before conveyed. Then, what is the obligation he fixes? It is, That those who are bound shall denude themselves, for the benefit of his heirs of tailzie, *and the heirs of their bodies*— I have not seen it any where stated, that it was urged by any body, that the heirs-male of the body of those daughters, provided they take in *seriatim* substitution, as I humbly think they do, would not have taken those other subjects ; or if there was no substitution among the daughters, that the heir-male of the body of the eldest daughter would not have taken. I see it asserted on one side, that they would, and not denied on the other. Who are the persons upon whom the obligation is fixed,—the heirs-male generally? To denude in favour of whom? The heirs of tailzie, and the heirs-male of their bodies? They are the ‘successors as aforesaid.’ But then it is said, that the whole weight belonging to this observation may be got rid of by this remark, That the ultimate destination is to ‘heirs-male whatsoever.’ And if you construe this clause about the *other* property to mean heirs-male of the daughters, and consider heirs-male of the daughters to mean heirs-male of their bodies, you must make the same construction with respect to the heirs-male whatsoever, who are the persons mentioned in the last destination. I do not think so ; because with respect to a last destination, where a man says it is to go to all his heirs-male whatsoever, your Lordships know, in the first place, that there is a great deal of difference between the effect of the deed, as to those persons who are named last in it, and those who are named in preceding destinations, as to their obligations, their liabilities to forfeiture, their liabilities to the effect and consequences of contravention. A great many important matters might be mentioned, with reference to which, as to them, there is a great distinction. It is a very easy thing to suppose, that

the author of a deed, in such a clause as this, might mean, that all the former substitutes should be the persons to whom, and to the heirs of whose bodies, the conveyance should be made; and yet that should not be made to his heirs-male, the last in the destinations, and the heirs-male of their bodies. The expression indeed might go beyond the meaning; but you are to reflect upon all the other observations which arise out of the words of the clause of destination to the daughters in that untechnically expressed destination to them, and which do in no way apply to the pure, dry, technical destination limiting them, and which aid you in saying, that in this clause he says, and does mean heirs of the bodies of the daughters; and that the latter destination the phrase in it alone would not authorise him to say he meant heirs of the bodies of his heirs-male whatsoever. Suppose that all the Drummonds and all the Flemings had been dead before the author of the deed, (a case he supposes in his deeds), the words heirs of the body then, in this clause, in that case, could have no meaning at all, unless you applied them to the daughters; because if all the Drummonds and all the Flemings had been dead, and if all those had been dead before the author of the deed, to whom, and to the heirs of whose bodies there is an express limitation, the consequence of that would have been, that this clause could not have operated then as a clause applying to the heirs of the body of any person, if heirs-male of the daughters does not mean heirs-male of their bodies. It seems, that it is not a wholesome mode of interpreting this instrument to say, that you will deny to the words 'heirs-male of the body,' in this clause relative to the *other* property, a power of giving a construction to the words 'heirs-male,' as to those persons, the heirs of whose bodies were very probably meant, as appears by all which precedes in the deed, where their heirs are described by the words 'heirs-male;' because you suppose, that you must apply them also to the heirs of the bodies of those who are brought into the deed, perhaps with a view to keep out the *ultimus heres* of the Crown, by reason that the words *may* reach them, when there is nothing in the preceding parts of the deed to point to an intention, that the heirs-male of *their* bodies should be described under the words 'heirs-male.'

"My Lords, The clause with respect to the provisions for the daughters appears to me also to have some weight. I cannot help stating to your Lordships, that it seems to me to have been the most singular intention in the world, that this person, both with respect to the provisions of these daughters, and with respect to the property in the estate, should be adverting to their marriages, and adverting to the heirs of the marriages, as he does in one place with respect to their provisions, and yet that their heirs-male should not be construed heirs-male of the body in this part of the deed. If he had meant simply, that there should be a limitation to Lady Jane Ker, or Lady Anna, or Lady Margaret, or Lady Sophia, and their

1810.

 KER, &c.
 v.
 INNES, &c.

1810. heirs-male general, what necessity was there for all this, about their marrying a person of honourable descent? Why does he allude thus always constantly to the idea of their marriages? Why does he, in every part of this instrument, allude to the circumstances of their marriages? If one of these Ladies had not married a person of lawful and honourable descent, to be sure she could not have taken,—the heirs of her body would not have taken. But if the first marries a person of lawful and honourable descent, and the second marries also a person of honourable and lawful descent, whom I suppose to be a substitute *serialim*, is it not a most extraordinary thing, that the author of this deed should have required a marriage of like nature in both cases, and yet, with respect to the marriage in the second instance, that the persons named should have no better chance than what depended upon the utter failure of all heirs-male general of the first taker? In the Linplum case, counsel seem to have admitted, that if there had been a substitution *serialim et nominatim* of Alexander and his younger brothers, 'heirs-male' of Alexander must have meant heirs-male of his body. If you think there is here substitution among the daughters, here you can apply this,—the admission seems to have been founded upon what must have been supposed to have been the intention.

"My Lords, I do not go through, because you may refer to it in the papers on the table, where you will find it much better expressed, the general reasoning that is to be found upon cases supposed to be probable and improbable on the part of the appellants, and on the part of the respondents. Upon that, your Lordships can inform yourselves better, and more accurately, by reading the cases, than by my detailing the matters to be found in them. But the result of my consideration of this part of the subject is, that I have not been able to satisfy myself, that these words, 'heirs-male,' occurring, not in a dry destination, but occurring in such a context as this, I mean the context of the clause of destination in the deed 1648, occurring in such a deed, where there is such a clause as to *other* property, occurring in a deed containing all *such*, the expressions and provisions which have been noticed, and the general object and plan of which is such as I have represented this of 1648 to be, I have not been able to satisfy myself, that these words must, by an inflexible rule of law, receive the largest construction. I cannot persuade myself, that they may not in legal construction receive a more limited interpretation, from all the considerations to which we have been adverting, provided that that interpretation is made upon grounds which satisfy your Lordships, that this is the declaration plain, and the manifest meaning of the author of the deed.

"My Lords, It is in that view of the subject it appears to me this case is to be treated. For the reasons I have stated, I do not think that the case of Linplum is an authority that binds us to hold, that the 'heirs-male' of the daughters of Hary Lord Ker were call-

we are satisfied that the 'heirs-male of their bodies' were intended to be called. On the contrary, I think that the case of Linplum with reference to the principle upon which the words, 'heirs-male' there were held to be 'heirs-male' generally, in order that younger brothers might be included, is a case which ought rather to stand, instead of in effect excluding the younger daughters by construction, to include the younger daughters as beneficially as the lands of this deed, and the author's intent, will allow us to include them. The decision of this House in that case turned upon this, as I think, that there was not manifestation enough of the intention of the author of the Linplum deed, to contravene the general and obvious meaning of the words 'heirs-male';—that there was not manifestation enough, from what appeared in the deed, that the author of the deed did not mean, that the brothers of Alexander of Drummelzier should take,—did not mean that the younger brothers of Hay of Belton and Lawfield should take,—that there was not proof enough, from the circumstances, that persons in several instances might be included under the word, 'heirs-male,' to whom the author of the deed had not manifested an intention to give any thing as tenants,—that the word 'descendants' had been used, and from the circumstances and passages from which argument had been deduced. The House saw, that if they did not give the words their usual meaning, all the younger brothers of Alexander must have been excluded,—the younger brothers of Hay of Belton must have been excluded,—the younger brothers of Hay of Lawfield must have been excluded;—that Lord Robert Ker, if Alexander had died without heirs of his body,—if John of Belton had died without heirs of his body,—if John of Lawfield had died without heirs of his body,—that Lord Robert Ker must have come in before the younger brothers of Alexander of Drummelzier,—must have come in before the younger brother of Hay of Belton,—must have come in before the younger brother of Hay of Lawfield, notwithstanding it was the expressed and manifest purpose of the author of the deed, to prefer the younger brother of Drummelzier; and it might be his intention, and probably was so, to prefer the younger branches of the Drummelzier family to Hay of Belton,—and to prefer Hay of Belton, and probably the younger branches of the Belton house, to Hay of Lawfield,—and to prefer all three to Lord Robert Ker. Contrasting the circumstances that would take place in one way of construing the instrument with reference to intention, with the circumstances that would take place in another way of construing the instrument with reference to intention, my apprehension is, that the judgment of the House of Lords in that case amounted to this, and principally to this, that it was a declaration, that it was more consistent with the intention of the author of the Linplum deed, to give the words 'heirs-male' their obvious construction, which would include individuals whom the House thought were probably the objects of the intention of the author of the deed, and who must have been excluded

1810.

KER, &c.

*
INNES, &c.

1810.

KER, & CO.

v.

INNES, & CO.

His Opinion
as to 'Heirs-
male' in this
case.

on a different interpretation of the settlement, than it could be shewn to be to interpret the words 'heirs male' in a more limited sense, because consequences would otherwise follow, which might be represented as difficult to be reconciled with the supposed intention of the author of the deed, in possible, not probable cases and events.

"My Lords, Reasoning in the same way, unless I have fallen in to a mistake, from which I have not been able to extricate myself, which I have anxiously endeavoured to avoid, by giving as painful an attention to this case as I could give, (not more painful than I know it was my duty to give to it), it does appear to me, to be the plain and manifest intention of the author of this deed, when he used these words 'heirs male,' in the clause as to the daughters, to mean 'heirs male of the body;' and unless there be some rule of law which says, that the author of a deed shall not tell you by the deed itself, that by 'heirs male' he means 'heirs male of the body,' some rule of law which says, that if he uses the words 'heirs male,' though he tells you he means 'heirs-male of the body,' he has bound you to strike out of the instrument, all the explanatory context,—all explanatory provisions,—all the explanatory plan and form of the instrument, as the Lord Ordinary said in the Marquis of Tweeddale's case; unless there be some such rule of law, it does appear to me, that the opinion of the great majority of the Court of Session is the right opinion.

"My Lords, The consequence of all this is, that as far as this applies to the action in the competition of brieves, it appears to me, that this clause created a *serialim* substitution to the four sisters, and the heirs-male of their bodies.

"It appears to me further, that the conveyances subsequent to the year 1648, and prescription, have not destroyed the title created by the destination in that deed. It appears to me, that Lady Margaret did not renounce that title, which, by the effect of this instrument of 1648, Sir James Innes claims as deriving under her; and it appears to me further, that these persons are heirs of tailzie. This view of the subject, I think, will exhaust the subject of the competition of brieves, as far as the opinion of the individual who has the honour of addressing your Lordships is material.

Reduction.

"With respect to the action of reduction, it furnishes a point of much importance in the law of Scotland. It is a point, however, upon which I feel myself very considerably in doubt, whether I ought to express any opinion upon it now in judgment. I have satisfied myself that I ought not now to express a judicial opinion upon it. Your Lordships will suppose I allude to the question of the fetters—to the question, whether there is a prohibition against altering the order of succession? I cannot conceive your Lordships will find yourselves sanctioned by any precedent which the journals of this House would furnish, to place yourselves in this situation, improbable enough to happen, but which is possible to happen, and which, if possible, ought to be contemplated. If it should happen

t the propinquity neither of Sir James Innes Ker nor of General Ker should be proved, you would have standing upon the journals this House a judgment upon the fetters in this deed, which would be a judgment that would apply to nobody ; a judgment that could be used neither for any body nor against any body : and I have not, in the best consideration I have been able to give this subject, been able to satisfy myself, that the moment is yet come, in which your Lordships should give your opinion judicially upon that. If the propinquity is proved in the brieves, it will then be for your Lordships, having the parties standing before you, to decide that question of fetters, which is a question which does not affect merely the two individuals who are about to establish their propinquity, but affects also, if they do establish it, third persons, whom, should they not establish their propinquity, they are not entitled to contend with.

“ My Lords, I forgot to mention the claim on the part of Mr. Allenden Ker, to be heard as a party in the competition of brieves. My opinion upon that is, that he has properly been made a party to that competition of brieves ; and if this were the moment in which a judicial opinion should be given upon the other question of fetters, I might have been disposed to say, that I have not found sufficient reason to differ from the Court of Session upon that. But it is not the time, in my opinion, so to do ; and I desire to be understood, as meaning to consider again, and reconsider that question. Your Lordships should not preclude yourselves from reconsidering it, when you are sure you will receive the argument from parties who certainly have an interest in contending the point to be argued, who undoubtedly have an interest in having it well decided, and who necessarily have an interest in what may be finally adjudged.

“ With this view of the case, I have to mention also, that I feel, after a great deal of consideration of the subject, incumbent upon me, not to leave this House at the close of this second session, without recording, in some form, the opinion which I have adopted upon the parts of the case which I have discussed. However unworthy I may be of that attention, it is very possible that your Lordships may be pleased to pay some attention to the opinion I may have formed upon a subject of this kind. If so, I cannot make it consistent with my sense of duty to your Lordships or the parties competing at the Bar, not to put your Lordships in possession of it. But I hesitate as to going farther now, because I am giving an opinion of an individual on a question of mighty interest to the parties at the Bar ;—I am giving an opinion upon a question of infinite interest to the titles both to Peerages and lands in the law of Scotland ;—I am giving an opinion in a case, where, though I happen upon these points to agree with a great majority of the Court of Session, I am very well aware that individual judges, entitled to the highest possible respect from such a person as I am, have held a different opinion, and have not only held a different opinion, but have

1810.

KER, &c.
v.
INNES, &c.

1810. held such opinion in a degree that has led them to consider and re-
 present my way of viewing this case, as a way of viewing it danger-
 ous to Scotch law. I am further giving it in the absence of a Noble
 Lord, who, during the whole of the hearing respecting the estates—
 attended that hearing; with reference to whom I have infinite
 satisfaction in saying, that he considered it most diligently—that he
 considered it most attentively—that he considered it most impar-
 tially—that he considered it most learnedly; and I do not think
 ought to press your Lordships to take a step now, that would pre-
 clude that Noble Lord (if, on a farther consideration of the subject
 he should think right so to do) from stating to your Lordships his
 sentiments (whatever they may be) upon the subject. The court
 therefore, that I have determined to take is this: I am sorry it may
 not be so satisfactory to the parties as I wish it should be; but
 am bound to take care that I do not inadvertently do wrong to any
 parties. The object I have in view is, to propose to your Lordships
 certain findings, in which what I have stated would be embodied;
 and offering them in the form of motions to your Lordships' House,
 you will easily find a way to take them into future consideration, if
 it should be found necessary. I have only to state with respect to
 myself, that if it should happen that a different opinion should be
 entertained by any body, I shall do that, which, if I continue to live,
 I know it will be my duty to do; I shall give the utmost attention
 to any reasons which can be assigned by any of your Lordships for
 holding a different opinion; but I should feel that I did not act so
 fairly and candidly as I ought to do, if I did not assure your Lord-
 ships, that the motions which I shall submit this day or to-morrow,
 contain, with respect to myself, my opinions upon these points of
 law, which I believe I shall not be able to alter. I have repeatedly
 considered this subject. I have again and again considered the sub-
 ject. I have considered it under all the anxiety that belongs to the
 importance of the case; and I am afraid that I must repeat, what
 before said to your Lordships, that if I am in an error, it is, with
 respect to myself, I fear, an invincible error."

KER, &C.
 v.
 INNES, &C.

RESOLUTIONS AND ORDERS OF THE HOUSE OF LORDS.

I.

" *Die Martis, 20^o Junii 18*

Competition
 of Brieves.

" Moved, That according to the just and legal construction
 " substitution of the deed 1648, to the eldest dochter of Har
 " Ker, without division, and their heirs-male, the several da
 " of Hary Lord Ker, in their order, and the heirs-male of t
 " spective bodies begotten *seriatim*, were called as heirs of t
 " provision, to take the estates conveyed by the said deed, i
 " ence to the heir-male general of the eldest, or of any other c

“ daughters; and, therefore, that Sir James Norcliffe Innes, so de- 1810.
 “ scribed in the interlocutors of the Court of Session, in case he shall
 “ prove himself to be the heir-male of the body of Lady Margaret KER, &c.
 “ Ker, and that there are no heirs-male existing of the bodies of the
 “ Ladies Jane and Anna Ker, according to the usual course of pro-
 “ ceeding in services, is to be preferred in the competition of brieves
 “ respecting the said estates; and that upon such proof made, the
 “ brieves purchased by Brigadier-General Ker ought to be dismissed.
 “ Ordered, by the Lords Spiritual and Temporal, in Parliament
 “ assembled, That the said motion be taken into consideration on
 “ the first cause-day in the next session of Parliament.

(Signed) “ GEORGE ROSE, *Cler. Parliamenti*.”

II.

“ *Die Martis, 20° Junii 1809.*

“ Moved, That it is premature for this House to determine the ap- Reduction.
 “ peals in the action of reduction, complaining of the interlocutors
 “ which find, That the estates of Roxburghe were held by the late
 “ William Duke of Roxburghe under an entail, which contains an
 “ effectual prohibition against altering the order of succession, before
 “ the pursuers' title and propinquity be established.

“ Ordered, by the Lords Spiritual and Temporal in Parliament
 “ assembled, That the said motion be taken into consideration on the
 “ first cause-day in the next session of Parliament.

(Signed) “ GEORGE ROSE, *Cler. Parliamenti*.”

III.

“ *Die Mercurii, 21° Junii 1809.*

“ Ordered by the Lords Spiritual and Temporal, in Parliament Order for Sir
 “ assembled, That the Lords of Council and Session do, notwith- James Innes
 “ standing the pendency of the Appeals in this House, respecting Ker's Service
 “ the Roxburghe Estates, if they shall so think fit, direct the Macers
 “ to proceed, according to the Interlocutor dated the 7th, and signed
 “ the 8th July 1807, (the said Interlocutor being understood by this
 “ House to mean, that Sir James Norcliffe Innes, so described in
 “ the Interlocutors of the Court of Session, is to be preferred in the
 “ competition of Brieves, if he proves, according to the usual course
 “ of proceedings in services, that he is the heir-male of the body of
 “ Lady Margaret Ker, and that there are no heirs-male of the bodies
 “ of Ladies Jean and Anna Ker respectively); but that such pro-
 “ ceedings of the Macers, and all acts, deeds, and proceedings, of
 “ whatever nature, to be made, done, or executed, by any person
 “ or persons, or following thereupon, shall be without prejudice to

1810.
 ———
 KER, &c.
 v.
 INNES, &c.

" any person or right, in case, upon determining the Appeals, or any
 " of them, in any manner relating to the Roxburghe estates, depend
 " ing in this House, this House should hereafter adjudge, that th
 " said Sir James Norcliffe Innes ought not to have been so preferre
 " as aforesaid, or shall, upon determining as aforesaid, or upon any
 " application made to this House, make any order, adjudication, or
 " judgment, contrary to, or inconsistent with the effect of such pr
 " ceedings of the Macers, or such other acts, deeds, or proceedings
 " as aforesaid, or any of them, in any respect; and that all costs
 " charges, and expenses attending, or to be occasioned by the same,
 " or in relation thereto, or in consequence thereof, or of any of them,
 " shall be paid as this House shall direct, and that the consideration
 " thereof shall be reserved.

(Signed) " GEORGE ROSE, *Cler. Parliament*."

IV.

" *Die Mercurii, 21^o Junii 1809.*

" Ordered by the Lords Spiritual and Temporal, in Parliament
 " assembled, That this House proceed generally upon the several
 " Roxburghe causes, on the first cause-day in the next Session of
 " Parliament.

(Signed) " GEORGE ROSE, *Cler. Parliament*."

20th June 1810.

(On the House resuming consideration of the Roxburghe causes in
 the following Session, after making a few preliminary observations),

THE EARL OF LAUDERDALE said :—

" I am fortunately released from the necessity of entering into any
 argument on the bearings of the deed 1644, which, I must think,
 was too much relied on in the Court below. For, with the Noble and
 learned Lord whom you have heard, I agree in thinking it impossible
 to travel out of the deed 1648 for the purpose of learning the mean-
 ing of the deed 1648; and even if this could be permitted, the deed
 1644, which was revoked and set aside by Robert Earl of Rox-
 burghe, appears to me, of all others, the most extraordinary source
 to which any one could resort for the purpose of collecting his inten-
 tions; far less, my Lords, can I regard this deed as a source from
 which I can infer any thing that can lead my mind to decide on the
 consequences of that deed of nomination he was empowered to make
 by the charter 1646, the construction of which is the more immediate
 question brought by appeal before your Lordships' House; for to
 me it appears impossible to doubt of the accuracy of that statement
 made by the learned Lord whose argument you have heard, that the

and 1644 can only be referred to in this case, in the same manner as would refer to any other deed, to learn the use made of particular expressions in the language of conveyancing; indeed, agreeing I do with the Noble Lord on this subject, I have only to regret, that there are some passages in the speech he addressed to your Lordships, in which most certainly he does not confine himself to what he has so accurately stated to be the only legitimate use of the deed 1644.

‘ I have the satisfaction also to think, that it will be unnecessary for me to intrude upon your Lordships with any argument to shew that it is the deed 1648, which must still exclusively regulate the succession to the estates of Roxburghe, as I am ready to avow a perfect coincidence of sentiment with the Noble and Learned Lord whom you have heard, in thinking, that the deed 1648, which is *cited and referred to in all the subsequent investitures* of the family, cannot be superseded by any length of possession on the investiture 1747.

“ Possessing also a similarity of opinion with that which has been stated to your Lordships, on the impossibility of giving any weight to the argument in favour of the construction of this deed, as concluded for by Mr. Bellenden Ker, it is in my power to save a considerable portion of your Lordships’ time, by abstaining from all remarks on this view of the question. It will also be my endeavour, in the course of what I shall have the honour of stating to your Lordships, to economise your time, by cautiously passing over every opinion delivered or hinted at on the question of the reduction, in which your Lordships have also heard counsel at your Bar; because I shall shortly state, before I sit down, the reasons why I must think, and why I conceive, on the principles stated by the Noble and Learned Lord who has addressed you, he must think, that the action of reduction comes by appeal before this House in a shape that renders the remitting of it to the Court of Session unavoidable.

“ Having thus, my Lords, enumerated the various branches of this important cause, in which my entertaining similar views with those that have been stated to your Lordships, will render it unnecessary for me to detain you by entering into any details, I have once more to express my most serious regret, that, on the main question, and on the disputed clause in the deed 1648, there is hardly any part of the reasoning your Lordships have heard to which I can implicitly subscribe.

“ My Lords, The clause which you have so often heard repeated in this House, is to the following effect:—

“ And quikis all failzeing be decease, or be not observing of the provisions, restrictions, and conditions above written, the right of the said estates sall pertain and belong to the eldest dochter of the said Mary Lord Ker, without division, and yr heirs-male, she always mareing or being married to ane gentilman of lawll and honourl descent, wha sall perform the conditions above and under-

1810.

KER, &c.
v.
INNES, &c.

1810. "written; qlkis all failzeing, and yr sds airis-male, to our neare—
"and lawful airis-male qtsomever."

KER, &c. "Before proceeding to the consideration of the very important
" questions which arise in the construction of this clause, allow me,
" my Lords, to express, in the strongest manner, my concurrence with
" the Noble Lord who has already addressed you, in thinking, that if
" any one has stated, that this clause cannot be construed but with
" reference to the words which themselves form the clause, he has
" delivered a most erroneous opinion. With him, my Lords, I agree
" in the accuracy of the statement, that the clause must be construed
" with reference to every thing that is to be found within the four
" corners of the deed in which it is placed; with this limitation, how-
" ever, that it shall be construed in a manner consistent with those
" known rules of construction recognised by the law of Scotland, into
" the details of which I shall have an opportunity of entering in a fu-
" ture part of what I am about to submit to your Lordships. Nay,
" my Lords, subject to this limitation, I go still farther; for I not
" only conceive it to be competent to look to every thing within the
" four corners of the deed, but I think justice requires your Lordships
" should do so, in every step of the reasoning employed to ascertain
" what is the legal import of the clause, so far at least as to prevent
" those who argue upon it, from assuming any thing as proved which
" proceeds on a partial view of the deed. And this observation, my
" Lords, leads me to remark, that though I shall follow the order which
" the learned Lord has pursued, I must thus early express my doubts,
" (on which I shall hereafter enlarge), how far the frame of the argument
" he has submitted to your Lordships, has not precluded the Noble
" Lord himself, after having so properly suggested this rule, from fol-
" lowing it, in what he has submitted to you in favour of that con-
" struction of this clause for which he has contended.

"For I certainly must feel, that the Noble Lord, by considering
" in the first instance what is the import of the words 'eldest daughter,'
" exclusive of the effect the term 'heirs-male' may have on that expres-
" sion, has violated the rule he has with such justice laid down. And
" I must also express to your Lordships my doubts, whether the Noble
" Lord did not again materially violate this rule, when he afterwards
" proceeded to use the words 'eldest daughter,' in the meaning so
" imposed upon them, for the purpose of inducing your Lordships to
" think it necessary to add to the generic term 'heirs-male,' the term
" of specification 'of the body.' For I do flatter myself, I shall con-
" vince your Lordships, that, by considering the clause thus disjoint-
" edly, and by excluding from his view circumstances of importance
" (which are to be found, not only within the four corners of the deed,
" but within the four corners of the clause), in forming these separate
" conclusions, the Noble Lord has contrived to acquire the use of
" an argument on which he has mainly relied, to prove to your Lord-
" ships that heirs-male ought to be construed to mean heirs-male of

ie body; which, if the whole clause had been considered together, could only operate to induce your Lordships to presume, that eldest daughter was used for the express purpose of denoting Lady Jane Ker.

1810.

KER, &c.
v.
INNES, &c.

“ My Lords, Having protested thus formally against this line of argument, on the effect of which I shall subsequently enter more at large, it is my intention, as I have stated to your Lordships, to pursue the order adopted in the argument you have heard. It shall, however, be my study cautiously to avoid, in what I have to submit to your Lordships, forming any conclusion, by excluding from my view either any one part of this clause, or any one part of this deed. Whilst I shall be equally cautious never to found any part of my argument upon what I feel myself obliged to ask you, *to have the undescension to admit as proved*, merely because it is consistent with the opinion formed in consequence of such reasoning.

“ Adopting this order, I have, in the *first* place, to solicit your Lordships’ attention to the reasoning on which I am induced to differ with the Noble Lord who has addressed you, on the mode of construing the words ‘ eldest daughter ’ in this clause, and to think, that ‘ eldest daughter ’ cannot with justice be construed as meaning ‘ daughters *seriatim et successivè*. ’ My Lords, On considering the import of the words ‘ eldest daughter,’ standing unconnected with any part of the context, though you have heard it stated that they may admit of many more expositions, it does not occur to me, (barring the technical sense, which in the Committee of Privileges has been imputed to them, of meaning in the eye of the law heir-female), that they can be used as descriptive of daughters in more than the four following situations. *First*, The eldest born daughter.—*Secondly*, The eldest at the time of making the deed.—*Thirdly*, The eldest at the time the succession opens.—*Fourthly*, A daughter who acquires that appellation at a subsequent period, by the death of her eldest sisters during her lifetime.

“ In the first case here stated, it cannot escape your Lordships’ observation, that a female obtains the title of eldest daughter by birth; whilst in the three last cases, she becomes entitled to it by the predeceasing of one or more of her sisters: And to me, it certainly appears that these are the only two modes by which this appellation can be acquired. For I must submit to your Lordships, that the idea of a lady’s being entitled to the appellation of eldest daughter from the death of a nephew, a grandnephew, or a great-grandnephew, must arise out of a meaning imposed upon the words by construction with other words with which they are conjoined, and never can suggest itself to the mind from the simple use of the words themselves.

“ My Lords, If I have the good fortune to carry your Lordships along with me in this reasoning, I know you cannot refuse to assent to the inferences I am disposed to draw from it, viz. That in which-

1st Point.—
‘ Eldest
daughter.’

1810.
 ———
 KER, &c.
 v.
 INNES, &c.

ever of these four modes a person becomes entitled to the appellation of eldest daughter, it is a definite designation, and applies to the situation of the lady in relation to her other sisters, she acquiring the title at a period of time which is fixed, either by their relative births or their relative deaths. It cannot, however, escape your Lordships, that, according to the sense of this term, as contended for by the respondent Sir James Innes Ker, a younger sister's (for example Lady Margaret Ker's) becoming eldest daughter, depended neither upon the relative births or deaths of any of her sisters. For, supposing the reasoning used by the respondent to be accurate, if the words of the destination had been to the 'eldest daughter, and 'the heirs-male of her body,' Lady Margaret Ker, without any reference to the births or deaths of her sisters, would have become eldest daughter at a different period from that in which she would have attained that appellation, if the destination had been to the 'eldest daughter, and her heirs-male.' And she would have become eldest daughter at a third period of time, if the destination had been to the 'eldest daughter, and the heirs-male or female 'of her body.'

"To those of your Lordships who reflect upon this subject, I cannot help suspecting it will appear, that our habitual familiarity with the laws of primogeniture and succession, give to the word *eldest* the faculty of producing an impression on the mind which in reality it ought not to effect. Eldest daughter, properly speaking, is an expression denoting an individual, just as much as the phrase youngest daughter; and if a destination to the youngest daughter 'of Hary 'Lord Ker, without division, and their heirs-male, she always marrying a gentleman of lawful descent,' would not have carried the estate successively to the elder sisters, as the younger sisters, or the heirs-male of the younger sisters failed; neither can the destination to the eldest daughter call to the succession any other person than the individual it denotes.

"To illustrate the absurdity of supposing that the words 'eldest daughter' in themselves can describe a series of persons, and to explain the consequences to which this hypothesis would lead, let me, my Lords, suppose, that the destination by Earl Robert had been 'to the eldest daughter of Hary Lord Ker, and the heirs of her 'body, whom failing, to the youngest daughter, and the heirs of her 'body.'

"It is obvious, that such a destination would have called, in the first place, Lady Jane Ker, the eldest daughter of Hary Lord Ker, and her heirs: Secondly, Lady Sophia Ker, the youngest daughter of Hary Lord Ker, and her heirs: Thirdly, That Lady Anna Ker, the second daughter, and Lady Margaret Ker, the third daughter, and their heirs, would have been disinherited. But if the expression 'eldest daughter' could be deemed to convey the meaning annexed to it by the respondents, Lady Sophia, the youngest daughter,

could not find herself called to the succession sooner than if she had ever been named ; and Lady Anna and Lady Margaret, the second and third daughters, and the heirs of their bodies, would fall to be preferred to their younger sister Lady Sophia, though she was expressly called in preference.

“ For though it is obvious, that Lady Sophia might urge her claim on the failure of the heirs of Lady Jane, the eldest sister, stating that the ‘ youngest ’ was called upon such failure, she would be at once defeated by Lady Anna’s statement, that she, upon the death of Lady Jane and her heirs, had become ‘ eldest,’ and that as such she had a right to be preferred.

“ The same plea, my Lords, would secure the preference to Lady Margaret, the third daughter, and her heirs, on the failure of Lady Anna, the second, and her heirs, and this absurd and monstrous consequence would result from the proposition that Lady Sophia, the youngest daughter, though expressly called to the succession, should only take, on the failure of all her three sisters and their heirs, when she would become entitled to the succession as eldest daughter, without deriving any preference from the special terms in which she was called. Indeed, it seems apparent, that the term ‘ eldest daughter ’ cannot, in construction, receive the meaning contended for by the respondent, when unaided by any expression with which it may stand connected. Suppose, for example, that a person having three sons, John, James, and Thomas, should destine his estate to his eldest son, and the heirs-male of his body ; whom failing, to the heirs-female of his body : if John, the eldest son, had a daughter, and James and Thomas each of them sons ; according to the mode of reasoning which imputes to the term ‘ eldest daughter,’ the meaning of daughters *seriatim et successivè*, the heirs-male of all the brothers would come in before the daughter of the eldest son, because, construing the term ‘ eldest son,’ as it is attempted to construe the term ‘ eldest daughter,’ it would have the effect of meaning sons *seriatim et successivè* ; and this destination to the eldest son and the heirs-male of his body, whom failing, to the heirs-female of his body, would, according to this reasoning, be understood to be synonymous to a destination to my eldest son, and the heirs-male of his body ; whom failing, to my second son, and the heirs-male of his body ; whom failing, to my third son, and the heirs-male of his body ; whom failing, to the heirs-female of my eldest son ; whom failing, to the heirs-female of my second son ; whom failing, to the heirs-female of my third and youngest son.

“ That this, my Lords, is an undeniable consequence of imputing such a meaning to the word eldest, when prefixed to the word son or daughter, is not to be doubted ; yet I hardly believe there is any lawyer who will have the smallest hesitation in pronouncing, that a destination to my eldest son, and the heirs-male of his body, whom failing, to the heirs-female of his body, would inevitably carry the

1810.

KEE, &c.

v.

INNES, &c.

1810.
 ———
 KER, &c.
 v.
 INNES, &c.

estates so destined to the heirs-female of that eldest son, on the failure of the heirs-male of his body, in preference to the heirs-male of the second son.

“ From all this, my Lords, I must submit to your Lordships, that it seems indisputably to follow, that, without some qualifying expression, the words ‘ eldest daughter ’ cannot be deemed to describe a series of persons ; they can in truth only denote a person in one of the four situations above stated ; and as Lady Margaret, the ancestor of Sir James Innes Ker, never stood in any of these situations, it is impossible to argue that the words ‘ eldest daughter,’ unexplained by the context, could make out the plea of Sir James Innes. It must, however, my Lords, be admitted, that eldest daughter is a phrase, the meaning of which must be gathered from the context ; it becomes therefore important, minutely to examine all the expressions with which it is connected, as these may undoubtedly give it a meaning, which it does not naturally possess.

“ In the *first* place, The clause calls the eldest daughter of Mary Lord Ker ‘ without division ; ’ and the respondents have contended, that these words *without division*, denote the four sisters having been called in succession.

“ The appellants, on the other hand, have contended, that the words *without division* point out exclusive possession, in opposition to divided possession, and that they would not have been essential either in the event of one daughter being called, or in the event of four daughters being called, though in both cases they would have had accurately the same meaning, and served the same purpose. Indeed, my Lords, the impossibility of giving any influence whatever to the words ‘ without division,’ has been, in my opinion, fully established by the argument your Lordships have already heard from the Noble Lord, in which it was illustrated by a quotation from the bond of tailzie 1640, where there is a destination to Lady Jane Ker, and her heirs-male ‘ without division,’ being one of thousands of instances that might be brought from the records, of these words being used merely for the purpose of expressing an exclusive right to possess, without any reference to a series of persons being called to the succession.

“ In the speech your Lordships have already heard, it has also been submitted to you, that the omission of the word *said* before the words eldest daughter, is a circumstance to which some weight is due, though I think the learned Lord, who has addressed you, has not seriously stated it as a ground that can be rested upon with the smallest degree of effect. But in the course of what I shall have the honour of stating to your Lordships, it will be my duty to explain very fully the meaning and effect of the words, *said*—*before*—*said*—and other words of reference, when they occur in deeds of this nature ; and I think it will follow, from what I shall then submit to you, without the possibility of dispute, that no weight whatever is due to the omission of the word *said*.

" My Lords, The next expression, or rather word, to be considered in forming a judicial opinion on the meaning of the words eldest daughter, as they are used in this deed, is the plural pronoun *their*,—in the phrase ' their heirs-male.' This, in the outset of the speech which your Lordships have heard, was pointed out to you by the learned Lord as a very material circumstance, though it was stated in one part of the same argument to make no great difference; whilst in another it was submitted to you, that the word *her* might be inserted instead of the word *their*, without great prejudice to the construction for which he contended. The same opinion, I recollect, was also hinted at by the Lord President of the Court of Session, in the very extraordinary speech he addressed to the Court on advising the reclaiming petition. I confess, however, that though I have minutely attended to every thing that has been said or written, either by Counsel or Judge in this cause, I have not yet heard any one attempt at an argument, to shew that the respondent's case would be tenable, if the singular pronoun *her* had been inserted instead of the plural pronoun *their*.

" By the respondent's counsel, it has been argued at the Bar, certainly with great ability, and I think with very considerable effect, that when the plural pronoun *their* is considered as connected with the phrase ' eldest daughter,' it creates the necessity of supposing, that more than one daughter was designated by that expression, and that in truth Robert Earl of Roxburghe must have meant to call his four daughters *successivè et serialim*.

In the first place, my Lords, it has been remarked to you, and truly remarked, that in various parts of this deed, ' plural words are used, describing individuals;' and the inaccuracy here alluded to undoubtedly occurs, not only in many passages of this deed, but in passages of many Scotch deeds that might be referred to. For example, in the clause with regard to the obligation to take the name and arms, it is said, ' That in case of failure, or that they refuse or forbear to take upon them the said surname, &c. in that case the person failing, and the heirs of *their* body.'

" Again, the obligation for provision to the remanent daughters is thus expressed: ' In case it shall happen the said Sir William Drummond, or any other heirs of tailzie, to succeed to the estate, then and in that case the samen *persone* sua succeeding, and *their* spouses to be joined in marriage with *them*, sall pay,' &c.

" The following passage is also to be found in another part of this deed: ' In case it shall happen *any* of the said daughters to depart this life before *they* be of the age foresaid, or yet before *they* be married, in that case the portion of the *daughter* sae deceisand before *their* marriage, as said is, sall return to our said heirs,' &c.

" It does so happen, however, with regard to all these three instances, as well as all other instances cited or referred to in the various deeds, which have on this occasion been submitted to the consideration

1810.

 KERR, &c.
 v.
 INNES, &c.

1810.
 ———
 KERR, &c.
 v.
 INNES, &c.

of this House, that the plural word is used in a manner such as to create no effect on the sense of the words with which it is conjoined— as the substitution of the singular instead of the plural pronoun would make no material difference.

“ For instance, my Lords, in the clause in relation to the obligation to take the name and arms, it is obvious, that if the words had been ‘ the person failing, and the heirs of *his body*,’ instead of ‘ person failing, and the heirs of *their body*,’ it could have made no difference in the meaning which it conveyed.

“ Now, my Lords, let me ask how it can with any degree of accuracy be inferred, from the circumstance of finding the plural pronoun conjoined with a singular collective noun, where it can make no difference in the sense, whether it is the singular or the plural pronoun; that where it is conjoined with words in such a manner as to make an alteration in the sense, it is to have the power of changing the meaning which the antecedent would otherwise possess. For my own part, I have not the least hesitation to state to your Lordships, that when in a deed there is a discrepancy between the pronoun and the antecedent, it is the antecedent which must direct the alteration to be made in the pronoun, instead of the pronoun authorizing an alteration of the antecedent.”

“ It is, however, asserted, which is a proposition I am in nowise disposed to deny, that you are not authorised, in construing a deed, to make any alteration, (I quote the words,) ‘ unless you are driven to it by a case of *necessity*.’

“ Agreeing, then, in opinion, that it is a case of necessity that can alone justify this operation, I must most earnestly request your Lordships’ attention to the consideration of what must be deemed to constitute a case of necessity. To me, my Lords, it appears, that when the sentence, without an alteration, is nonsense; and when a variety of circumstances, connected with the sentence, combine to point out the particular alteration that ought to take place, this is the case of all others which would justify such a proceeding. Now, in the *first* place, It is without fear or dread I assert to your Lordships, that this clause as it stands is nonsense; because I have the authority of the learned Lord, who preceded me, for saying so. I repeat the words he used in describing it. ‘ *Taking the words as they stand*, if I may be permitted to use such an expression in this case, *they are nonsense*.’ In the *second* place, I think I have shewn you, that all the circumstances connected with the sentence, combine to demand the same alteration of the pronoun *their* into the pronoun *her*.

“ It is, however, stated to your Lordships, that if the construction I contend for should be given to this sentence, it would involve the necessity of an *alteration*; and the argument, to my astonishment, is seriously conducted, as if it could be maintained, that the construction which the learned Lord, who preceded me contends for, does not equally involve the necessity of alteration.

"With all due submission to him, however, I think I might, with the greatest safety, put the accuracy of my opinion at issue, upon the sole point, of desiring the learned Lord to express the sense he attributes to the antecedent of the plural pronoun *their*, without altering the expression.

"I know, in the argument the Noble Lord has offered to you, he distinctly said, that 'eldest daughter *means* daughters *successivè et serialim*.' Is there, then, any difference betwixt this proposition, saying, that the term 'eldest daughter' must be *altered* into daughters *successivè et serialim*?' Would it give, in the opinion of that learned Lord, or in the opinion of any of your Lordships to hear me, the least additional force or effect to my argument, if, instead of contending, that in construing the sentence, you must alter the plural pronoun *their*, into the singular pronoun *her*, I was to contend that the word *their* must be taken, in construing the sentence, as *meaning* her? I am sure, if this, which I must consider as a ridiculous subterfuge, can have the least effect, I am ready to adopt the phraseology in addressing your Lordships.

"If the learned Lord's argument, therefore, is to be stated as an argument to construe the sentence, by giving the words 'eldest daughter,' the meaning of 'daughter *serialim et successivè*,' (as he expresses it), let mine be stated as an argument, for giving to the word *their* the meaning of the word *her*, and then let us go to the issue upon that state of the case. On the other hand, if I am to be stated as arguing to your Lordships, that the sentence should be construed, by altering the word *their* into the word *her*, let that learned Lord be also stated as contending, that the sentence should be construed, by altering the words 'eldest daughter' into 'daughters *serialim et successivè*;' and I express myself equally ready to go to issue upon that state of the question.

"For, so far from disputing the proposition as stated by the learned Lord, 'that if you can give a consistent meaning to the words forming the phraseology of a deed, you are not at liberty to alter one syllable of it;' I admit it in its fullest extent. Nay, I go a little farther, and I say, that if a case of necessity exists, where a sentence has no consistent meaning without alteration, you are bound judicially to construe it, *so as to make the least possible alteration*."

"Whatever may be your Lordships' decision, however, in regard to the meaning of the words 'eldest daughter,' I have the satisfaction to reflect, that the effects of it must exclusively operate on the case now under your consideration.—It can neither undermine any principle of law established by decisions, nor give rise to confusion in the tenure of landed property, by the effect it may have on deeds of a similar nature. Far different is the case with the point to which I must next solicit your Lordships' attention; for you cannot decide, that the words 'heirs-male' can be taken to mean 'heirs-

1810.

KERR, &c.
v.
INNES, &c.

1810.

KER, &c.
v.
INNES, &c.

male of the body,' on the ground of the presumed intention of the author of the deed 1648, without pronouncing a decision more generally interesting to all who have any connection, however remote, with landed property in Scotland, than any that ever resulted from a judgment of your Lordships' House.

2d Point.—
'Heirs-male.'

"Here, then, I must solicit your Lordships' attention to an examination of this question so extended, and so minute, that my sense of the serious importance of the subject can alone plead my vindication.—The Noble and learned Lord, in proceeding to discuss this branch of the argument, has stated, that the question presenting itself for your Lordships' consideration may be shortly put thus,— 'Whether the words 'heirs-male' in the clause to which we have so often had reference, mean, *in the intention of the author of this deed* as that intention is to be collected from the context, and the other parts of the same instrument, for so I would put the case to your Lordships; whether these words 'heirs-male,' mean heirs-male general?—or whether they mean 'heirs-male of the body' of the person or persons to whom they refer?'

"Now, my Lords, before I enter on the discussion of this subject, I must say, that, consistently with the reasoning I am about to submit, I cannot agree with the statement that is here made to you.—For it will be my object to show you that, by the law of Scotland, your Lordships are precluded from considering what was or what was not the intention of the author of the deed, and your view of the question must be confined to the consideration of what intention is expressed by the words used in the dispositive clause of the deed.

Linplum
Case.

"I do, however, perfectly agree with the Noble Lord in what he has stated concerning the importance of the cases that have been relied on. I do in particular completely concur in the opinion he has delivered, that if the case of Hay of Linplum has decided, that the words *heirs-male* occurring in that destination, had a precise fixed technical meaning, which the intention of the entailor, however clearly expressed, was not sufficient to separate from the words, such a decision must imperiously regulate the judgment now to be pronounced.

"I am aware, my Lords, that in the speech you have heard, there is a variation in the terms in which this proposition is announced, from those in which I have now expressed it.

"It was on that occasion admitted, that the Linplum case must be conclusive on the subject of the question concerning the meaning of the term 'heirs-male; if it decided, that the words 'heirs-male,' occurring in such a destination as this, (meaning such a destination as that of Robert Earl of Roxburghe's in the year 1648), cannot bend to the intention of the author.

"These two propositions, however, I hold to be the same, and that position is broadly admitted in the speech of the Noble Lord, in the following terms :

“ ‘ The Linplum case arose upon a settlement, with reference to which, I should not do justice to the present case, if I did not state, that, like this Roxburghe case, it was a regular entail ;—like this Roxburghe case, it was not to take effect till after the entailor’s death ;—like this Roxburghe case, the question discussed and decided in it was a question of competition between heirs,—it involved nothing with respect to creditors or onerous purchasers ; there was not therefore that distinction in it which, your Lordships recollect, we have heard much of at the Bar ;—it was upon the construction of a clause relating to destination ;—it was upon the construction of a clause, upon which the question depended, on whom, and in favours of whom, the fetters were imposed.’ ”

“ Under these circumstances of similarity, I think there is no anger of its being disputed, what must be the decision in this case, of the judgment of the Courts below, and that of this House in the case of Linplum, proceeded on the ground, that the term ‘ heirs-male’ occurring in the clause of destination, could not be controlled by the presumed intention of the author, however clear, so as to give it the legal meaning of the words ‘ heirs-male of the body.’ ”

“ It is, my Lords, this impression of the importance of the cases, and particularly of that of Linplum, which dictates to me, as it did to the Noble Lord, the propriety of adopting an arrangement that leads to canvass the bearings of those cases that have been relied upon, before discussing the general grounds on which I am disposed to rest the propriety of the opinion I am about to deliver to your Lordships concerning the legal effect of the term ‘ heirs-male’ in the clause of Robert Earl of Roxburghe’s settlement in the year 1648.

“ I shall also follow the arrangement of the speech your Lordships have already heard, by soliciting your attention in the first place to the case of Hay *versus* Hay, usually cited under the denomination of the Linplum Case ; the reasoning on which, in the speech of the learned Lord, may be properly examined under two heads.”

(Here his Lordship went into an examination of the cases at great length, concluding thus) : “ That, when I now look back and review what has fallen from the learned Lord, I certainly do feel that no reasonable ground has been stated for giving to the words ‘ eldest daughter,’ the meaning of daughters *seriatim et successive* ;— whilst I try in vain to discover any thing like a tenable ground for maintaining that Earl Robert intended to use the term *heirs-male* meaning *heirs-male of the body*.”

VISCOUNT MELVILLE (in the Reduction) spoke in substance as follows :—

“ My Lords,—

“ Two days ago, in a short conversation which took place among our Lordships in the Committee of Privileges, I had occasion to state, that I entertain very great doubts as to a principle of law

1810.

KER, &c.

W.

INNES, &c.

1810.

KER, &c.
v.
INNES, &c.

stated in the second Resolution laid last year on the Table of the House by the Noble and Learned Lord on the Woolsack. I am the more anxious to explain the reason of my doubts, because both the Noble and Learned Lord, and the Noble Lord who gave his opinion at length this day upon the whole cause, seemed to concur in the opinion, which I conceive to be erroneous.

"The Resolution states, 'That it is premature for this House to determine the appeals in the action of reduction complaining of the interlocutors which find, that the estates of Roxburghe were held by the late William Duke of Roxburghe under an entail which contains an effectual prohibition against altering the order of succession before the pursuer's title and propinquity be established.'

"Now, I conceive, that by the laws and practice of Scotland, it is not necessary for a person taking out such a brieve, to establish his propinquity by a proof, previous to the discussion of the rights of the parties in a competition of brieves. The general principle, and the foundation of the practice which universally takes place on a competition of brieves, is pointed out in the following quotation from Lord Stair, one of the oldest and most respectable authorities with regard to the law and practice of Scotland. His words are, 'The brieve and claim are as a libel, against which any party comparing, and found to have an interest, may propone their exceptions, which are many more than those contained in the said last act of Parliament 1503, cap. 94.'

Stair's Inst.
iii. 5. 33.

"The proposition which I am now contending for has been solemnly recognised by the Court of Session in the very case now before your Lordships.

"Sir James Innes and General Ker began their proceedings by severally taking out brieves for serving themselves heirs of entail in special under the deed of 1648. Upon these brieves a competition ensued before the Macers.

"Pending the competition, they severally sued out their actions of reduction. To enable them to obtain decree in these actions, it is necessary that one or other of them should be served heir of entail; that is the title upon which alone decree can be granted in their favour. But it is according to the practice of the Court, repeatedly recognised in the House of Lords, to allow such actions of reduction to proceed *pari passu* with such competitions of brieves.

"Mr. Bellenden Ker insisted, that he should be heard for his interest in the competition of brieves. He strenuously contended also that neither party should be allowed to obtain a service till the merits of the actions of reduction were first of all discussed. In support of his pleas on this subject, he insisted upon several cases decided in the Court of Session and in the House of Lords.

"He was successful upon both points before the Court of service. On the 14th of February 1806, the Court remitted to the Macers with instructions to find, *first*, that Mr. Bellenden Ker, &c. have a

title to appear in the service ; and, *second*, that the points of law with respect to the construction of the tailzie and settlements of the state of Roxburghe must in the first place be determined.

“ In a competition of brieves, it is obvious, that neither competitor has a certainty of obtaining a service in his favour. It is obvious, too, that in such a competition points of law and of construction must arise and be decided. These are either decided by the Assessors, or are remitted by them to be decided in the Court of Session.

“ It is not necessary to give authorities for this : It is inherent in the very nature of the proceeding. There are often many contending parties in a competition of brieves ; and it would render the proceeding endless and inextricable, if it was necessary that every separate competitor should establish his propinquity by a proof, previous to a discussion of the respective rights of the parties.

“ The Court, on the suggestions of Mr. Bellenden Ker, having returned to the actions of reduction, the interlocutor of the 13th of January 1807 was pronounced therein, deciding the points of law.

“ Various cases bearing upon this were stated by Mr. Bellenden Ker in the Court below. In the case of *Don v. Don*, (Forbes 28th November 1712), there was a competition of brieves, in which points of law came to be discussed. Upon the report of the Assessors, ‘ The Lords stopped the service till the point of right be summarily discussed, and remitted the contending parties to be heard before the Lord Ordinary to that effect.’

“ The other cases still more closely resembled the present, and were also decided upon appeal.

“ The first of these was the *Cassillis* case, 27th February 1760. In that case, the Earl of March took out brieves for serving himself heir of entail in special to the then late Earl of Cassillis ; he, also, during the dependence of his brieves, brought an action of reduction-improbation against Sir Thomas Kennedy, as disponee of the said late Earl of Cassillis.

“ Sir Thomas Kennedy was admitted for his interest in the service ; but the Court proceeded to a judgment in the reduction before it was determined if the pursuer had a title ; and in the same interlocutor which decided in favour of Sir Thomas Kennedy in the reduction, they stopped all further procedure in the service. This judgment was affirmed upon appeal.

“ So, in the great question between the Duke of Hamilton, and Lord Selkirk, and Mr. Douglas, the same course of proceeding was adopted. Mr. Douglas was disponee under a general disposition executed by the Duke of Douglas, to which he had right by general service. The Duke of Hamilton and Earl of Selkirk took out brieves for serving themselves heirs in special to the deceased Duke of Douglas, and during the dependence of their brieves, brought actions of reduction of the deed, under which Mr. Douglas, the disponee, claimed.

1810.

KER, &c.

INNES, &c.

1810.
 KER, &c.
 v.
 INNES, &c.

"The whole proceeded there as in the present case. They went at once to the merits of the reduction, before allowing the service to proceed, and in the same interlocutor which decided in favour of the defender in the reduction, they found that the brieves of the Duke of Hamilton and Earl of Selkirk could not proceed. This interlocutor was affirmed on appeal.

"It is impossible almost to distinguish that case from the present. In it there was a competition of brieves between two competitors, and actions of reduction at their instance against a disponent. The same mode of proceeding which has been adopted in this case was adopted in it.

"It is true, that in these cases of Cassillis and Douglas, the judgments of the Court were in favour of the disponents; but if they had been in favour of the competitors, it would still have remained for them to establish their title by service.

"If your Lordships should adopt the principle suggested in the Resolution, the consequence would be, that after the competition of brieves is completed, the actions of reduction, both as to the existence of the old entails and the *fens*, must be commenced anew. Thus two years more may be spent in the Court below. The cases may then be brought here by appeal, and may be hung up for an indefinite time, perhaps eight or more years, before they come in course for hearing; and all this, though these causes have been fully considered and argued in the Court below, and the appeals in the reduction have been heard for twenty-five days in Session 1808.

"The necessary consequence of this will be, that one competitor will be removed at least. Sir James Innes Ker can have no hope that he should survive this delay. It would render his situation worse than it was before the commencement of these causes.

"It is conceived, that your Lordships will hesitate before you adopt a principle leading to such consequences; and, upon the ground of the principles I have stated, and the authorities to which I have referred, I am confident, that the prematurity alleged in the Resolution upon which I have offered these observations, is not warranted by the law and practice of Scotland, and ought not to influence the proceedings of your Lordships in the further arrangements of this long depending litigation. If there are any points in the questions of reduction upon which your Lordships are disposed to entertain further consideration, it is competent for you to reserve those points to a future opportunity; but there can be no reason, either in justice or in form, for sending back any part of the case to the Court of Session."

NOTE.—*The Resolution was, upon motion, withdrawn.*

VISCOUNT MELVILLE (in the Competition of Brieves) spoke in substance as follows:—

"My Lords,

"It is not my intention to trouble your Lordships with any

words on the present occasion ; but having formed a decided opinion, I feel it a duty, under the circumstances of the present case, to state distinctly what that opinion is.

“ I had not the advantage of hearing the long and able pleadings which originally took place at the Bar of this House on the subject of the present competition ; but I have carefully perused all the printed pleadings in the Court below, and the cases which have been submitted to your Lordships. I have also studied the elaborate statement of the different points in the case given by the Noble and Learned Lord on the Woolsack at the close of the last Session of Parliament. I have likewise had the benefit of hearing the very able statements which have been urged in the pleadings before the Committee of Privileges, in consequence of the claims recently brought forward by Lady Essex Ker ; and I have attentively listened to the very elaborate argument of the Noble Lord who has just sat down. And upon a mature consideration of every topic which has been stated, I must confess to your Lordships, I feel it impossible to resist the conclusion which I formed a considerable time ago, and which is expressed in the first of the resolutions laid upon the table last year as the result of the opinion the Noble Lord on the Woolsack had then formed, after a painful and anxious examination of every deed and every circumstance which had any relation to this important cause. My opinion is, ‘ That according to the just and legal construction of the substitution of the deed 1648, to the eldest dochter of Hary Lord Ker, without division, and their heirs-male, the several daughters of Hary Lord Ker, in their order, and the heirs-male of their respective bodies begotten *seriatim*, were called, as heirs of tailzie and provision, to take the estates conveyed by the said deed, in preference to the heir-male general of the eldest, or of any other of the said daughters ; and therefore that Sir James Norcliffe Innes, so described in the interlocutors of the Court of Session, in case he shall prove himself to be the heir-male of the body of Lady Margaret Ker, and that there are no heirs-male existing of the bodies of the Ladies Jane and Anna Ker, according to the usual course of proceeding in services, is to be preferred in the competition of brieves respecting the said estates ; and that upon such proof made, the brieves purchased by Brigadier-General Ker ought to be dismissed.’

“ All the parties interested in the present competition have very liberally availed themselves of the usual privilege, of resorting to collateral deeds and circumstances in support of the claims which they respectively maintain ; and for that purpose, the bond 1640, the charter 1644, the charter 1646, and the marriage-contract 1655, have all in their turn been pressed into the service of the contending parties. In the judgment I have formed upon this case, I have no occasion to enter into any controversy, to what extent it is justifiable, by the fair rules of interpretation, to have recourse to other

1810.

KER, &c.

INNES, &c.

1810.

KER, &c.
v.
INNES, &c.

deeds, clauses, and circumstances in order to form an ultimate opinion upon the rights of parties: For in truth, according to the view I have of the present cause, I hold myself to be acting upon every legitimate principle of construction, when I contend, that if the clause on which the question confessedly turns, does, without any foreign or collateral aid, admit of a natural construction, expressive of the intention of Robert Earl of Roxburghe as to his succession; that is the construction which ought to be adopted, without having recourse to strained and artificial interpretations, in order to draw out his intention from other deeds or clauses. The clause in the deed 1648, to which I have already referred, does, in my opinion, admit of such a clear and distinct construction, without unnecessarily torturing the meaning of the terms used, or wantonly disregarding any of the words which the maker of the deed has made use of. The term '*eldest dochter*,' is the most important for consideration; and I do not conceive, that it is either a strained or unnatural construction to contend, that the expression of '*eldest daughter*' is susceptible, both in legal construction and common parlance, of being interpreted to mean the eldest daughter at various different periods, *either* at the time when the deed is made, *or* at any time during the life of the maker of the deed, corresponding to the variations in the state and numbers of the females alluded to in the deed, *or* at the time when the succession opens, which is to be regulated by the deed. In the present case, it appears to me to be clear, that the maker of the deed meant by this description to refer to the eldest of the daughters of Hary Lord Ker at any time the succession should open to the heirs called by the substitution in the deed 1648. And it does not appear to me, that, considering the expression made use of, *viz.* '*their heirs male*,' it is possible to put any other construction on the expression '*eldest daughter*,' without doing a wanton and unnecessary violence to the terms made use of in this material clause. Nor am I in any degree shaken in that opinion by the elaborate argument, and the various cases and illustrations which have been resorted to, to establish the proposition, that heirs-male in legal language means heirs-male in general. I can without difficulty admit the proposition as an abstract and general one; but it is impossible for me to admit, that the expression is to be held of so stubborn a nature, as to be incapable of a limitation to heirs-male of the body, if that construction appear to be more consistent with the general frame of the clause, and the terms used in it. *Their* heirs-male are prominent words in the clause, and are incapable of any rational meaning, if heirs-male is to receive so unlimited a construction as that contended for by General Ker. It is certainly, in every view of the situation of Earl Robert's family, more natural to suppose, that he meant all the daughters of Hary Lord Ker, than that he should, under the then circumstances of the family, exclusively select his eldest grand-daughter, and pass immediately from her to

heirs-male in general, overlooking and passing by all the other
 orders of Hary Lord Ker. It is not a sound argument to observe,
 in answer to this, that Earl Robert appears to have been so whim-
 sical in the selection of his heirs from among his descendants that
 before you are to reject the natural and just construction of the
 clause in his settlement, when, without departing from the
 meaning of itself, it is capable of a plain and obvious meaning, and a
 construction collected without having recourse to any forced or strained
 construction.

1810.

KER, &c.
 v.
 INNES, &c.

"I shall not longer intrude upon the patience of your Lordships,
 knowing that, in the few words I have used, I have made the
 substance of my opinion sufficiently intelligible."

After their Lordships had spoken, the following judgment
 was moved by LORD ELDON, and carried:—

20th June 1810.

It was ordered and adjudged, That so much of the inter-locutor of the Lords of Session of the 14th Feb. 1806 as contains an instruction to the Macers to find that John Bellenden Ker, Henry Gawler, and John Seton Kerr, Esq., had a title to appear and be heard for their interest in the said services, and so much of the said interlocutor of the Court of Macers of the 17th Feb. 1806, as finds, in conformity to the said instruction, be affirmed. And it is declared that, according to the just and legal construction of the substitution of the deed 1648, to the eldest daughter of Hary Lord Ker, without division, and their heirs-male, the several daughters of Hary Lord Ker, in their order, and the heirs-male of their respective bodies begotten *seriatim* were called as heirs of tailzie and provision to take the estates conveyed by the said deed, in preference to the heir-male general of the eldest, or of any other of the said daughters; And it is further ordered and adjudged, That the said interlocutor of the Lords of Session of 6th, signed 10th March 1807, and the said interlocutor of the 7th, signed the 8th July 1807, (the latter interlocutor explaining the former interlocutor of 6th, signed 10th March 1807, and being understood by this House to mean that the said Sir James Innes Ker is to be preferred in the competition of brieves, if he proves, according to the usual course of proceedings in services, that he is the heir-male of the body of Lady Margaret Kerr, and that there are no heirs-male of the bodies of Ladies Jean and Anna respectively), be affirmed, and

Judgment in
 Competition
 of Brieves.

1811.
 —————
 DURHAM, &c.
 v.
 DURHAM, &c.

that the said interlocutor of the Lord Ordinary on *the* Bills of 27th Feb. 1808, be also affirmed. And it is further ordered, That the said original and cross appeals be dismissed this House.

[The consideration of the appeal in the reduction and declarator was postponed until it was seen that Sir James Norcliffe Innes, in proceeding with his service, succeeded in proving his propinquity as nearest heir-male of Margaret, *third* daughter of Hary Lord Ker, and that Ladies Jane and Anna, and the heirs-male of their bodies respectivè, had failed. This having been done by Sir James, the House of Lords again resumed consideration of the reduction and declarator, and pronounced in it the following judgment.]

House of Lords, 8th June 1811.

Judgment in
the action of
Reduction.

Ordered and adjudged, That the appeal be dismissed, and that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *Thos. Plumer, Wm. Adam, Mat. Ross,*
John Clerk, James Moncrief.

For the Respondents, *David Boyle, Sir Samuel Romilly.*
Ad. Rolland, Ro. Craigie, Archd. Cullen, W. Horn.

[Fac. Coll. vol. xiii. p. 141, et M. 11220; Napier on Prescription, p. 219.]

MRS. JANET DURHAM, and ALEX. WEIR, her	}	<i>Appellants;</i>
Husband,		
MRS. SARAH DURHAM, and MAJOR WILLIAM	}	<i>Respondents.</i>
SHILLINGLAW, her Husband,		

House of Lords, 5th March 1811.

SPECIAL SERVICE—HEIR OF LINE, OR HEIR OF PROVISION—LIMITED OR UNLIMITED TITLE—FALSA DEMONSTRATIO—PRESCRIPTION.—An estate was conveyed “ to Jean Bruce (wife of Adolphus Durham) “in liferent, and Robert Durham, her eldest son, and the heirs “ lawfully to be procreated of his body in fee ; which failing, to “ the other heirs, male or female, without division, procreated or to “ be procreated betwixt the said Adolphus Durham and the said “ Jean Bruce ; which failing, to the other heirs male or female “ without division,” of the said Janet Bruce. Charter and infeft-

ment were obtained on this conveyance in 1702, in favour of Robert Durham, in these terms. He thereafter died without issue, male or female. His younger brother (the present party's grandfather) took out a special service, and was served nearest heir of line to his brother, and he having died, his son was served in same terms. Prescription had run upon the title so made up. By the death of Thomas, the last heir male, the succession opened to the heirs female *without division*, under the original conveyance. The appellant contended that the investiture having been conceived in favour of heirs of line, for seventy years, the limited title had been worked off by the unlimited title by force of prescription, and he had right to succeed as heir portioner, along with her sister. Held, that there were no *termini habiles* for prescription of the charter 1702, that charter being still extant and unlimited in its nature, and these retours of service to be construed as conformable hereto, and carrying the original unlimited title; and, therefore, whenever one has two unlimited titles in his person, he is supposed to possess on both.

1811.

DURHAM, &c.
v.
DURHAM, &c.

The female parties in this case are sisters of the late Thomas Durham, Esq. of Boghead; and the question at issue between them is, Whether Mrs. Shillinglaw, the respondent, entitled to succeed as sole heiress of provision to her said brother, in the lands of Foulshiells, or can only claim as heir portioner, with her sister, the appellant.

This question is made to depend on the titles upon which Foulshiells estate was held. The great-grandmother of the parties (Jean Bruce) married to Adolphus Durham, their great-grandfather, had acquired it by conveyance from her uterine brother, Thomas Hamilton, who, having no children of his own, conveyed in these terms, "Be it known to all men by these presents, I Thomas Hamilton of Boghead, heritable proprietor of the lands and others after mentioned, for the love and favour I bear to Jean Bruce, my sister uterine, spouse to Adolphus Durham, merchant in Edinburgh; and a grateful sense of the goodwill and kindness of the deceased David Bruce, merchant in Edinburgh; father to the said Jean, who did substitute me, failing of her and Hugh Bruce, his children, in the disposition and assignation made and granted by him to them, of his haill lands and estate, heritable and moveable, to have sold, annailized, and disposed, likeas I be these presents, with and under the reservations and conditions after mentioned allenary, and no otherwise, sell, annailzie, and dispo from me and my heirs, to and in favour of the said Jean Bruce in liferent, and Robert Durham, eldest

1811. "lawful son to the said Adolphus Durham, and to the
 DURHAM, &c. "heirs lawfully to be procreate of his body in fee: *which*
 v. "failing, to the other heirs, male or female, without division,
 DURHAM, &c. "procreated or to be procreated betwixt the said Adolphus
 "Durham and the said Jean Bruce; which failing, to the
 "other heirs, male or female, without division, to be law-
 "fully procreate of the body of the said Jean Bruce, in any
 "other marriage; which all failing, to my own nearest heirs
 "and assignees whatsoever, all and whole the lands of
 "Foulshiells."

In the disposition there was no procuratory of resignation of precept of sasine, whereby the disponee could not be infest without considerable expense, he, after his sister was
 Nov. 15, 1701. dead, executed a procuratory of resignation, proceeding upon the narrative of the omissions in his former settlement, whereby he conveyed his lands of Foulshiells in these terms: "in favour, and for new infestments of the same, to
 "be made and granted to the said Robert Durham, and to
 "the heirs lawfully to be procreated of his body; which
 "failing, to the other heirs, *male and female, without divi-*
 "*sion, procreate betwixt the said Adolphus Durham and the*
 "*said Jane Bruce*; which also failing, to my own nearest
 "lawful heirs and assignees whatsoever."

By the law of Scotland, there being no succession through the mother, Jean Bruce, as sister *uterine* only to Mr. Hamilton, could never have succeeded to him, nor of course her children, so that the family of Adolphus Durham had right to the lands of Foulshiells by these deeds of Mr. Hamilton, and by these only.

- In consequence of the procuratory of resignation, Robert
 1702. Durham obtained a charter from the crown of these lands of Foulshiells, in which the destination is in these words:—
 "Dilecto nostro Roberto Durham filio legitimo natu maxi-
 "mo Adolphi Durham, mercatoris Burgen. Burgi de Edin.
 "procreat. inter illum et quond. Jeanam Bruce ejus spons-
 "am et sororem uterinam quond. Thomæ Hamilton de Bog-
 "head et hæredibus de ejus corpore legitime procreand.
 "quibus deficien. aliis hæredibus masculis seu fæmellis *sine*
 "*divisione* procreat. inter prædict. Adolphum Durham et
 "Jeanam Bruce. Quibus deficien. prædict. quond. Thomæ
 "Hamilton suis propinquiribus, et legitimis hæredibus et
 "assignatis quibuscunque hæreditarie et irredimabiliter."

In virtue of this charter, Robert Durham was infest.

Robert Durham died without issue, and without making

ation of this settlement of the estate. On that
the succession devolved on Thomas Durham, his
brother, the claimant's grandfather, who made up
the lands by a *special* service in 1729. The weight
to the respondent's construction of this service,
being a special service, is of importance to be at-
tended to, because it specially proceeds upon and enume-
rates conveyances above set forth, and the terms there-
in the retour of this service the following words
, " Thomas Durham est legitimus et propinquior
lineæ dict. quond. Roberti Durham sui fratris ger-
ens omnibus et singulis," &c. This, it was alleged,
was of an erroneous character which the retour stamped
as Durham by mistake, which being contrary to the
evidence produced and specially referred to, was thereby cor-
rupted itself.

Under the service being discovered too late for
it, it was alleged that in taking sasine upon it, the
lineæ was omitted, and Thomas was infeft as
an heir and lawful heir," which, being a flexible term, can
be understood in no other sense than to import heir of pro-
his brother in the said lands.

As Durham died soon thereafter, and was succeeded
by his eldest son Robert, who, after possessing on apparen-
tly several years, served himself *heir in special* to his
father. He was served " propinquior et legitimus *hæres*
dicto quondam Thomæ Durham ejus patri," under
this character it was alleged that he too was heir of pro-
his father. The retour, in like manner, specially mentions the
year 1702, and the destination of the succession therein.
As Durham having died, was succeeded by the claim-
ant's father Thomas Durham. He possessed the estate
until 1798, when he served himself heir to his
father in the lands of Foulshiells. This retour bears " Quod
Thomas Durham est *unicus filius et propinquior et*
heir dict. quond. Roberti Durham ejus patris
et aliis mentionat. secundum retortum specialis
dict. quond. Roberti Durham, ut hæredis Thomæ
in patris sui inibi datam 6to die Augusti 1745, et
sententiam sasine subsequen. super præceptum a can-
onico in ejus favorem datam 17 Octobris, et recordatam
in publico registro sasinarum apud Edinburgh 2do die
Octobris 1745." Thus declaring that his title thereto
was the same as that of his father and grandfather.

1811.

DURHAM, &c.
v.
DURHAM, &c.
1729.

1730.

1745.

1798.

1811. Mr. Durham died, of this date, unmarried, and without leaving any settlement of these estates. Whereupon the present question arose between his two sisters; the respondent, as his eldest sister, considering that, by virtue of the titles to the estate, she was entitled to the whole without division. She accordingly purchased a brieve from Chancery, to have herself served, which was resisted by her sister, and who likewise procured a brieve to be served heir portioner.

DURHAM, &c.
DURHAM, &c.
Aug. 7, 1799.

The competition in these brieves was carried by advocacy to the Macers of the Court of Session, and the Judges of that Court appointed, in common form, two of their number to be Macers, who ordered the parties to state their claims in mutual memorials, and the Macers, on advising the memorials, took the cause to report to the Court; for which purpose they ordered the parties to prepare informations.

Nov. 24 and 25, 1802. The Court thereafter pronounced this interlocutor: "Upon report of Lord Glenlee, and having advised the mutual informations for the parties, find that Mrs. Sarah Durham *alias* Shillinglaw, has the sole right to be served heir provision to her brother, the deceased Thomas Graham, in the lands of Foulshiells, and in the superiority of the lands of Langrigg, but that she must pay a composition to her sister, Mrs. Janet Durham *alias* Weir, for her share of the said superiority of Langrigg, and remit to the Macers to proceed accordingly."*

* 24th November 1802.

Opinions of the Judges:—

LORD MEADOWBANK said,—“The institute, Robert Durham, obtained the investiture in 1702, and there has been no new grant from the crown since that time. There have been a succession of returns of heirs of line, and these are now unchallengeable, but what they have carried is the investiture in 1702. There is no prescription here; because there is no investiture to be set up against the original one in 1702.”

LORD HERMAND.—“I don't think it requires to go deep into the decisions to show that an infeftment, whether from the crown or the subject, will carry the subjects in terms thereof, and I don't see how we can get the better of prescription.”

Mor. 10803. LORD PRESIDENT.—“I think that part of what Lord Meadowbank said is right. The valuable decision in *Kilkerran, Bogle and Smith v. Gray*, explains that an *unlimited* title with possession will work off a limited title. But where there are two *unlimited* titles,

the superiority of Lanrigg stood in a different situation, 1811.
being of small importance, the judgment in regard to it
acquiesced in. DURHAM, &c.
v.
DURHAM, &c.
Dec. 14, 1802.
a reclaiming petition by the appellants the Court ad-
j. *
they presented a bill of suspension, but this was refused. Mar. 8, 1805.

can be no prescription, because there is nothing to lose or gain
description. The only limitation here is, that the succession
go to heirs female without division, which I consider to be no
tion at all. And there is no other title opposed to it. The
es don't appear to me to signify one button. I will admit them
be good. What then? They have no limitations to work off.
original investiture still remains, because there is no other con-
tory title to set up against it. Both the titles are *unlimited*,
one of them is lost by prescription. Any of the Durhams
have altered the destination at pleasure, and, of course, there
is freedom or immunity that they were to gain by prescription.
otherwise when a man possesses under a tailzie. He is fetter-
ed may prescribe immunity."
rd Meadowbank's Session Papers, vol. 68.

* *Advising, 14th December 1802.*

ORD PRESIDENT CAMPBELL said:—"The case of Cassillis
different from this, as it was a general service about which the
is arose; but here it is a special service, and I therefore think
the services all referred to the original investiture 1702, and
it from prescription. But, besides, I think the case of Bogle Mor. 10803.
Smith to be sound law, and to refer to every case where a man
two *unlimited* titles in his person. The man could not prescribe
at himself,—but must have something to gain or lose by pre-
sion. Here there was nothing to lose or gain. There were no
s in this investiture, but it was competent to take up the one
e other, as the heir thought proper; and although the Durhams
served as heirs of line, it was still open to serve as heirs of pro-
l."

ORD ARMADALE.—"I do not think that prescription in the
te 1617 applied at all to questions among heirs; but only to
ions between a man and his heirs, and third parties; and I
think on that account the case of Bogle to be good law."

ORD MEADOWBANK.—"I think prescription does not apply in
ase of retours and precepts from the Chancery, with infestment
on, when *the original charter is extant*. This is precisely con-
to the words of the act 1617, which requires only a connection

1811. Against these interlocutors the present appeal was brought.

DURHAM, &c
v.
DURHAM, &c. *Pleaded for the Appellants.*—1. The only investiture or title upon which the appellant's grandfather and brother held the estate of Foulshiells, was in favour of *heirs of line*, and therefore it necessarily descended to *heirs of line*, and the appellant, in that character, had just the same right to take up this estate, as to take up the other property which belonged to her brother, and to which she has been allowed to succeed without contest. 2. The appellant's right to succeed as heir of line, in virtue of the investitures of her predecessors in that character, is completely secured against the claim of the respondents, and of all others, by the express terms of the statute 1617, c. 12, which has most justly been considered as one of the most valuable enactments in the statute law of Scotland, not only as quieting the minds of the lieges against all dormant claims, whether upon the part of the crown or others, but also as curing all defects which might have originally taken place in framing the title or investiture, but which cannot be challenged after the period of 40 years. 3. It is said by the respondents, that where two rights are in the same person, and both of them are unlimited, prescription cannot be pleaded by the heirs of the one right against the heirs of the other; and the case of *Bogle v. Gray*, 30th June 1752 is founded on as supporting this doctrine; but there is several answers to this, 1st, Although every one whose title is challenged may found on every right in his person, whether feudal or personal, so as to defeat the plea of the person attempting to evict his right, yet, according to strict feudal principles, the possession must be imputed to, and prescription can only be pleaded upon the title secured by infeftment for 40 years. 2d. It was utterly impossible to ascribe the possession, in the present case, to any other title than to the investiture as heirs of line. The appellant's grandfather, father, and brother, never having any other title whatever in their per-

Mor. 10803.

of these sasines forty years when the original charter is not extant. When it is not extant, *the presumption is, that these renovations are in terms thereof.* But there is no reason for presumption where it is extant; and the original charter here being extant, I think there were no *termini habiles* for the prescription of it, because all these renovations must be considered to be renewals of it."

Lord Meadowbank's Session Papers.

as than as heirs of line, and as there was not even a personal right vested in them under the deed 1699, this right is not transmissible to their heirs through them, and there could be no competition of these rights. 3d. The consequences of the judgment pronounced by the Court of Session are most dangerous. It may not only have the effect of rendering useless the valuable statute of prescription, but of disturbing the rights and properties of almost all the families in the kingdom who have enjoyed landed estates for any length of time, and it is directly opposed to every principle hitherto established in the law of Scotland. For, supposing a destination could be discovered which had remained latent and unknown for centuries to heirs male, and that the estate had been possessed for all that period by regular and feudal investitures to heirs of line, nevertheless if this decision be affirmed, the heir male, or any other heirs under these old and latent destinations, which may have been neglected for centuries, may now come forward and take the estate from the heirs of line, perhaps the daughters of the last proprietor, who were the heirs of investiture. In regard to the original destination here, it is evident that the words "to the other heirs, male or female, without division," extended only to the *immediate children* of Adolphus Durham and Jean Bruce, and not to their descendants, and therefore that the exclusion of heirs portioners could not be extended any further.

Pleaded for the Respondents.—1. In the title to the estate, Sir James Hamilton conveyed it to the heirs of his body, which included, *to the other heirs*, male or female, *without division*, Adolphus Durham and Jean Bruce. Females are therefore called to succeed without division, which clearly excludes heirs portioners. In the first place, it is a direct line succession that is established by the deed, viz. a succession in favour of heirs male; and there being no room in it for heirs of conquest, the succession must naturally devolve on the eldest heir male, one after another. But heirs male and female without division are coupled together in the same sentence; so that the plain meaning of the testator is, that the eldest heir female should be preferred, in case the succession opening to females, in the same way as the eldest heir male (if there had been heirs male) would have had the preference.

2. It being indisputable that the succession is given to the female without division, the spirit of the law of Scot-

1811.

DURHAM, &c.
v.
DURHAM, &c.

1811. land necessarily leads to the preference of Mrs. Shillinglaw
 ——— Even in the case where the common law takes effect, an
 DURHAM, &c. divides the succession among heirs portioners, the eldest
 v. allowed a preference. She gets a title of honour, the pri-
 DURHAM, &c. cipal mansion-house and garden, and any superiorities she
 may have belonged to the predecessor; and the very reason
 assigned for this by Mrs. Weir and her husband, viz. that
 these particulars cannot be divided, and that superiorities
 cannot be multiplied, showed the preference given to elder
 heir female, who gets all those rights that will not bear di-
 vision, and of course, where a whole estate is given to a
 heir female without division, the legal interpretation is, that
 the eldest must be preferred. Nor is there any reason for
 supposing, as is contended for by the appellants, that the
 exclusion of heirs portioners was confined to the heirs of
 Adolphus Durham and Jean Bruce, because, if he had an
 dislike to any of them he could have excluded them altoget-
 her, and not left it to the contingency of whether the
 second, third, or fourth daughter succeeded, on failure of
 elder sisters. His object seems to have been, to transmit
 his estate *entire* to his successor, and to let it go by the
 same destination by which he held his paternal estate. For,
 by the ancient charters of the estate, it appeared that heirs
 portioners had been excluded, the heir female being called
without division.

But the appellants say, even supposing all this were true,
 yet as the estate has been held upon titles of those who
 were served as heir of line, and infeft as heir of line, for a
 period of seventy years, the previous investitures are com-
 pletely done away with, and the right is thus secured by
 the positive prescription secured by the statute 1617, c. 12.
 But this proceeds upon the mistaken supposition that Robert
 Durham's service of 1729 was a mere service as heir of
 line. It was a service as heir of provision as well as of heir
 of line. It is a proposition confirmed by repeated decisions
 that if, in a special service, there appears on the face of the
 retour, conclusive evidence of the character in which an heir
 serves, or must necessarily serve, it is quite enough to en-
 able him to take every subject destined to an heir of that
 particular description, just as much as if he had specified
 the particular denomination. In regard to general services,
 perhaps it may be different. But no difficulty can occur in
 special service, because the claimant does not set forth any
 general character, but positively avows his intentions to

serve himself heir to the lands specified in his claim, so that it is reasonable to presume that he wishes to assume that character. Accordingly, in the present retour, he expressly claimed to be served as in right to the following titles: 1. To a charter in favour of Hugh Watt and his son Robert, and their heirs and assignees, dated 24th May 1677. 2. To a charter from the crown in favour of Thomas Hamilton of Boghead, 5th Dec. 1679. And lastly, To a charter from the crown, dated 24th March 1702, in favour "of Robert "Durham of Foulshiells, *brother german of the claimant* "Thomas Durham, therein designed eldest lawful son of "Adolphus Durham, merchant burgess of Edinburgh, pro- "created between him and the deceased Jean Bruce, his "spouse, sister uterine of the said Thomas Hamilton, "Boghead, and the heirs of his body, *whom failing*, the "other heirs, male or female, without division, procreated "between the said Adolphus Durham and Jean Bruce." Thus the words "heir of line" contain merely a *falsa demonstratio*. It was clear that the Inquest saw his true character of heir of provision set forth in the deeds; and their meaning of necessity was, that being thus *brother german* and HEIR OF LINE to his brother Robert, he was *therefore* his *heir of provision* in the lands specially claimed. The decisions support the conclusion that the service so taken is not inconsistent with a service as heir of provision. In *Livingston v. Menzies*, 22d Jan. 1706, it was found that a general retour as *heir of line*, carried right to a provision in a contract of marriage in favours of heirs male, both characters coinciding in the same person, although nothing appeared in the service as to the terms of the contract. In *Dalhousie v. Lord and Lady Hawley*, 13th Nov. 1712, the Earl of Dalhousie, in 1646, made a settlement of his estate in favour of George Lord Ramsay, his son, and the heirs male of his body; whom failing, to his own heirs male whatsoever; by virtue whereof Lord George was infeft in 1647. William Earl of Dalhousie, the eldest son of Lord George, expedite a service in 1647, and was infeft "*tanquam legitimus et propinquior haeres to his father*." To this Earl William another Earl, his cousin german, being served heir male in 1711, pursued a reduction improbation against Lady Hawley and Earl William's only child, and heir of line of all rights and titles to the estates in her person, founded upon the supposed defect in her father's service. "The Court, however, "found that Earl William being eldest son, and thereby

1811.

DURHAM, &c.

v.
DURHAM, &c.Forbes' Coll.
p. 74. Mor.
14007.

Mor. 5241.

1811. "both *heir male* and of *line* to Earl George, and served
 ——— " *legitimus et propinquior haeres* to him in lands, whereina
 DURHAM, &c. " Earl George was infeft to himself, and his heirs male ought
 " to be understood as served in the terms of Earl George's
 DURHAM, &c. " infestment, and therefore repelled the objection, and sus-
 " tained the process." This is a decision expressly in
 Mor. 14016. point in favour of the respondents. In *Bell v. Carruthers*, June 1749, the service had taken place in the wrong character, Jane Bell having been served heir of provision instead of heir of line, yet the Court found that Jane Bell so served, although in that erroneous character, was entitled to take up the provision as heir of line, because the service itself showed that she was actually the person called. Other decisions, down to *Graham v. Durham*, 31st Jan. 1798, were referred to. In this last case, an objection was stated to the progress of titles, That although the same were settled by marriage contract upon David Muirhead, and the heirs of his marriage with Mrs. Jean Scott, yet the precept of *clare constat*, by which Alexander Muirhead, the son of that marriage, had made up his titles to the lands so provided, bore only that "he was nearest and lawful heir of his father," and did not expressly bear that he was heir of provision, though it recited the contract of marriage, and that this was the investiture under which the lands were held. The objection was repelled. This was a case of *falsa demonstratio*, and of the same nature with the present. *Orr v. Orr*, Nov. 1798, and *Blane v. Earl of Cassillis*, 1807, were also founded on.
- Graham v. Durham.
 Jan. 31, 1798.
 Mor. 15118.
 Unreported,
 ante p. 1.

2. But the respondents contend, even supposing these were not good services as heirs of provision, still they would be entitled to take as heir of provision under the old investitures. 3. And, in pleading this last ground, the positive prescription now set up to fortify the services and infestments taken as heirs of line, would not avail, because she has a right to ascribe her right to the best of any two titles that may be in her person. The object of the statute 1617, c. 12, regarding the positive prescription, obviously was to secure a person and his family, *who have the title thereby required*, from all challenge and inquietude at the instance of strangers claiming the estate from them; but not by any means to prevent the succession going according to the established investiture, or to prevent that investiture, or even a separate personal deed from taking place. But even if prescription had run on the services and infestments taken

as heir of line, these services, as they refer specially to the rights by which the claimant claims, as heir of provision, the service as heir of line must be qualified by the rights upon which it proceeds, which is that of heir of provision, and therefore held to comprehend a service as heir of provision. Consequently, the prescription pleaded upon these can only go to confirm the respondents' right, and not undo it. In *Smith and Bogle v. Gray*, Kilk. 30th June 1752, a case of Voce Prescription. this nature was decided, where a party possessed for about 60 years upon retours and infeftments in their favour as heirs of line, and yet a *simple destination*, executed by their father, which had lain dormant for nearly 80 years, was found to be effectual to carry the estate from the heir of line to the heirs substituted in that deed. So that the appellants' plea on the ground of prescription cannot avail in this case.

After hearing counsel, it was
Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *John Clerk, David Cathcart.*

For the Respondents, *Wm. Adam, Sir Samuel Romilly,
J. Wolfe Murray.*

THOMAS CADELL and WILLIAM DAVIES, Book-
sellers in London ; and WILLIAM CREECH } *Appellants ;*
Bookseller in Edinburgh,
JAMES ROBERTSON, Printer in Edinburgh, *Respondent.*

House of Lords, 16th July 1811.

LITERARY PROPERTY—COPYRIGHT — PROTECTION BOTH BY THE ACT AND AT COMMON LAW.—This was the case of an interdict and action of damages brought by the appellants, in right to the copyright of the Works of Burns the Poet, which, after the publication of Dr. Currie's edition, had been pirated and published by the respondent. The book had not been entered at Stationers' Hall, and the Court of Session held, that the only protection lay in the statutory penalties; and if the book was not entered in Stationers' Hall, no action was competent at common law for indemnification or protection. In the House of Lords, this judgment was reversed by a special declaration, stating that, though the work was not so registered, yet that the parties had, for the term specified in the statute, a right vested in them, entitling them to maintain a suit for damages, and also to interdict in case of the violation of

1811. that right. It was also held, That the penalties and forfeitures in
 CADELL, &C. the statutes of Queen Anne applied only to the first fourteen years,
 v. and not to the second.
 ROBERTSON.

The appellants were proprietors of the Works of the late Robert Burns, the Scottish poet ; and the question at issue by the present appeal was, Whether the appellants had any legal remedy for the protection of the right which they had acquired in the copyright of these works, though they had not been entered in the register book of the Company of Stationers in London ; and if they had such legal remedy, what that remedy was ?

In the year 1786, Burns published at Kilmarnock, in Ayrshire, the first edition of his poems.

In the year 1787, he published in Edinburgh, a second edition, which he sold to the appellant, Mr. Creech. As to this edition, the term granted by the statute expired in 1801.

In the year 1793, the poems of Burns came to a new edition. On this occasion he added twenty new poems to the collection. The property of these new pieces was vested in the appellant, Mr. Creech, in consequence of an agreement entered into between the author and him in the year 1787. By this agreement, Burns conveyed to the appellant, Mr. Creech, his right of property in this new edition, in the following terms:—"The sole property legally inherent in
 1793. "me of the poems already published by me in one volume
 "octavo, and of which I am the author, with any additions,
 "alterations, or corrections I may make to the said volume,
 "in any future edition, if such shall be."

The benefit of this right the appellant, Mr. Creech, communicated to the other appellants, Messrs. Cadell and Davies. Of the additional pieces published in 1793, the exclusive privilege, according to the provisions of the statute, did not expire till the year 1807.

In the year 1796 Burns died. He left his family in very distressed circumstances, their only resource being in the publication of his works. Dr. Currie of Liverpool benevolently undertook to be the editor of a complete collection of these ; and the appellants were applied to by the guardians of the family, and by Burns' widow, (who had been confirmed his executrix, and had conveyed her rights as such to trustees), to purchase the book when prepared for the press. The appellants agreed to the proposal, and, on the 25th of February 1800, a contract was entered into between the appellants of the one part, and of the other, "William Max-

“ well, Esq., physician in Dumfries, John Murdo, Esq. of 1811.
 “ Hardrigga, and John Syme, Esq. collector of stamp-duties
 “ at Dumfries, the acting trustees for the family of the de- CADELL, &c.
 “ ceased Robert Burns, sometime residing in Dumfries, v.
 “ North Britain, Gilbert Burns, farmer at Mossgeil, only ROBERTSON,
 “ brother and nearest heir-male to the surviving infant chil-
 “ dren of the said Robert Burns, Jean Armour, the widow
 “ and mother to the said children, William Thomson of
 “ Moat, writer in Dumfries, factor *loco tutoris*, appointed by
 “ the Right Honourable the Lords of Council and Session in
 “ Scotland to the said infant children, viz. Robert, Frances,
 “ William Wallace, Nicol, and James, of the said Robert
 “ Burns and Jean Armour, during their pupillarity.”

The agreement proceeded on the recital :—That the said Messrs. Thomas Cadell, William Davies, jointly, with the said William Creech, were entitled to the copyright of the Works formerly published of the said Robert Burns, for the remainder of a period of years then unexpired; and the family of the said Robert Burns having in their possession at the time of his death several original works and writings of his own composition, and then unpublished, the said trustees, upon the behalf of the family, agreed with the said Messrs. Thomas Cadell and William Davies, and William Creech, that the same should be united and incorporated with the said Works so formerly published. And that a new complete edition of such, and so many of the works and compositions of the said Burns as James Currie, M.D. and F. R. S. of Liverpool, with the advice and consent of the said trustees, should think proper for publication, should be printed in four volumes octavo, with a life of the said Robert Burns to be prefixed thereto, to be written by the said James Currie. Therefore, and for certain valuable considerations to be paid, and obligations to be performed, on the part of the appellants, the other parties “ give, grant, bargain, sell, assign, and con-
 “ firm, unto them, their executors, administrators, and assigns,
 “ all that the said intended edition, not exceeding 2000 copies,
 “ in four volumes octavo of the Works of the said Robert
 “ Burns, with his life, by the said James Currie, to be prefixed
 “ thereto, so to be printed and published, under the super-
 “ intendence of the said James Currie, and at the costs,
 “ charges, and expenses of the said Thomas Cadell and
 “ William Davies; and also, all the copyright, right of
 “ authorship, use, interest, trust, property, claim, demand,
 “ privilege, and authority whatsoever, which the said Ro-

1811. "bert Burns in his lifetime had, or which they, the said
 CADELL, & CO. " William Maxwell, John Murdo, John Syme, Gilbert Burns,
 v. " Jean Armour, and William Thomson, or any other of
 ROBERTSON. " them, or any other person or persons, now have, or of
 " right ought to have, by force or virtue of any law, statute,
 " usage, or custom whatsoever, or howsoever, of, in, and to
 " the said Works of the said Robert Burns, and his life to
 " be prefixed thereto, and to be contained in such intended
 " edition, and every part and parts thereof. And also
 " of, in, and to all other works and compositions of the
 " said Robert Burns, which may not be inserted in such in-
 " tended edition, together with full power and authority to
 " print and reprint all such works, and to sell, vend, and
 " dispose of the same from time to time; and at all times
 " hereafter to have and hold the said intended edition, and
 " all future editions of the said works, and also the copy-
 " right in and to all the works of the said Robert Burns,
 " and all other premises with the appurtenances hereby
 " assigned; and all profit, benefit, and advantage that shall
 " or may arise by and from printing, reprinting, publishing,
 " selling, vending, and disposing of the same, unto the said
 " Thomas Cadell and William Davies, their executors, ad-
 " ministrators, or assigns, as their own proper goods and
 " chattels, and sole and exclusive property for ever, for so
 " long time as such property can or may by law subsist,
 " remain, and endure."

Under this assignment, joined with the original assign-
 ment in the year 1787, the appellants were fully vested in
 all right of property, or exclusive privilege, in regard to
 these works, which had stood in the persons of Burns or of
 his representatives.

In 1802, about two years after the publication of Dr. Cur-
 rie's edition of Burn's Works, the respondent, James Ro-
 bertson, a printer and bookseller in Edinburgh, published a
 book, entitled, "Poems, chiefly in the Scottish dialect, by
 " Robert Burns, 1802."

Besides the poems published in 1787, of which the term
 of exclusive privilege had expired in 1801, this publication,
 the appellants stated, included many poems pirated from the
 edition 1793, and from Dr. Currie's edition of 1800.

In order to stop these depredations, the appellants brought
 a suspension and interdict (injunction), which was passed by
 Lord Meadowbank, Ordinary on the Bills.

They also raised an action in the Court of Session against

respondent, concluding against him to pay to the pursuers the sum of £200, in name of damages, and as an indemnification for the loss they had sustained by his invasion of their exclusive right, and for £60 sterling of expenses.

The bill of suspension and action of damages were founded on the before recited assignments, and upon the act of Parliament of the 8th of Queen Anne, c. 18, entitled, "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies during the time therein mentioned."

These two actions being conjoined, the respondent stated the following defence:—That the appellants had not produced the assignments from Burns and his family upon which they founded their title to bring the action; but this defence having been done away with by producing the assignments, the defences were, 1st, Supposing the appellants to have a legal right to the exercise of the exclusive privilege of printing Burns' Works, there was, in point of fact, no invasion of that privilege, since all the poems published by the respondent were either first published in the edition of 1787, the privilege of which was admitted to be expired; or were given freely to the public, and abandoned by Burns himself, who sent them to newspapers, or occasional publications, not only with no expectations of emolument, but with express contempt for remuneration. Secondly, With regard to the poems in Dr. Currie's edition, published from the manuscripts found in Burns' repositories, the respondent contended, that there was not vested or acknowledged by the law any right to the executors or representatives of a deceased author, exclusively to print and sell his unpublished compositions. That his family, after his death, might refuse to publish them, or they might sell them as manuscripts; but if they published them to the world, they could claim no exclusive privilege of multiplying copies of them. On the merits, it was pleaded, 1st, That even in the simplest and most abstract case, no author, nor assignee of an author, has by the statute of Queen Anne, an exclusive privilege relative to a book which has been published, unless it has been previously entered in Stationers' Hall. And, secondly, That at all events, even were such exclusive privilege admitted, though it might justify an interdict, or give the appellants right to penalties, it could never be made the foundation of an action for damages.

Lord Glenlee, before whom, as Ordinary, the cause came, rendered memorials, to report the whole cause to the Court.

1811.
 CADELL, &c.
 v.
 ROBERTSON.

He also directed a condescendence to be given in, so that certain disputed facts might be specifically stated by the parties, to be answered by the respondent.

The disputed facts related to the question, Whether, on the supposition that the appellants had a right to legal remedies for the protection of a book not entered in Stationers' Hall, the respondent was not entitled to plead that all the pieces which he was accused of having pirated from the editions in 1793 and 1800, had been abandoned to the world by Burns himself before they appeared in either of these editions.

The Lord Ordinary, in ordering this condescendence, expressed his opinion that the appellants ought to specify the poems which they charged against the respondent as piracies; and that the respondent should, on his part, specifically state in what manner he intended to justify the publication of these particular pieces, and from what publication he alleged he had taken them, which accordingly the appellants did, by furnishing a list of the pirated pieces. But the respondent, instead of a specific answer, contented himself with stating, 1st, That the poems first published in the edition 1793, were never conveyed to the appellants, there being (as he stated) no new conveyance from Burns at that period, and that the original contract in 1787 only gave a right to the poems then published, with any additions, alterations, or corrections, which the author might make on them; and did not extend to any new poems he might afterwards compose. And, 2d. That all the other poems in the appellants' condescendence were abandoned and given to a publication, termed, "Johnston's Musical Museum," or to the collection of songs published in Edinburgh by Mr. Thomson, without any reservation of Burns' right of property. Informations for the parties were also given in and reported to the Court by the Lord Ordinary. When the cause came to be advised, the Court took it up as a question, chiefly, if not solely, as to the effect of the statute, whether or not it could protect the copyright of a book not entered in Stationers'

May 16, 1804. Hall? And pronounced this interlocutor:—"Upon the report of Lord Glenlee, and having advised the informations for the parties, the Lords recall the interdict; find the letters orderly proceeded; sustain the defences against the action of damages; assoilzie the defender, and decern."
 Dec. 18, 1804. On reclaiming petition, the Court adhered.*

* Opinions of the Judges.

LORD PRESIDENT CAMPBELL.—"There is one point only agreed

Against these interlocutors the present appeal was brought to the House of Lords. 1811.

Pleaded by the Appellants.—1. The appellants being proprietors of the Works in question for the term of years granted by the statute of Queen Anne, had, by virtue of that statute, a right vested in them, which they were entitled to have protected by an interdict, and by an action of da-

CADELL, &c.
v.
ROBERTSON.

here ; and this is upon the late act, in regard to literary property. In my opinion, the decision of the cause does not depend on this point alone, but much more upon others. 1. The few poems which are in question had been abandoned to the world before any of these editions were published. 2. They were mixed up in the mass of the volumes published and republished by Dr. Currie, as to which the term of the statute is expired, and cannot be prorogated by this device of putting in a few additional poems, especially as even these had come under the original purchase. 3. The statute, whether conferring a new right, or settling the boundaries of an old one, prescribed remedies as the only ones that could be used, and left no room for actions of damages. The conditions there set forth were adopted accordingly, and this is the true reason why the clause concerning entry in Stationers' Hall is so worded. Is it possible that two actions could go on at the same time, or two conclusions—one for damages, the other for penalties? Monopolies in general cannot well be imposed by actions of damages. The fines provided by the act, or the penalties, or the seizure of the goods, are the proper remedies.

“As to injunctions and interdicts, these are no evidence of common law right, or indeed of any right at all, unless perhaps a *prima facie* one granted every day, and upon any colour of right, to keep matters entire, until the merits are tried, especially where it is in favour of possession. But suppose only a statutory penalty, *e.g.* stamp acts, it is very proper to grant an interdict against doing what the law declares punishable.”

LORD JUSTICE CLERK (HOPE).—“I am for adhering.”

LORD WOODHOUSELEE.—“An action of damages lies at common law, and the entry in Stationers' Hall was only applicable to the case where the penalties alone are sought to be recovered, and the limitation of action to three months applies to the whole statute.”

LORD HERMAND.—“No ; it does not. There is a literary property at common law.”

LORD MEADOWBANK.—“A British statute cannot be construed differently here, and in the House of Lords. I am clear that the action lies here, independent of the entry in Stationers' Hall.”

LORD ARMADALE.—“The damage given to the author is the forfeiture and delivery of all the sheets published to the author and his assignees, who also may be the informer. I am for adhering.”

1811.
 CADELL, &c.
 v.
 ROBERTSON.



mages as in the present case. 2. The condition of entry in Stationers' Hall does not apply to the vesting the property of any work in the author, or his assignees, for the term of years limited by the statute; but such condition of entry relates merely to the subjecting the offenders to the forfeitures and penalties of the act granted. The intention of the Legislature, in passing the act of Queen Anne, was to accomplish two objects. In the first place, To declare, in absolute terms, that an author and his assigns should have the exclusive privilege of printing and reprinting his own works for the term of fourteen years from the date of publication; and for a second term of fourteen years, provided he should survive the expiration of the first; and, 2ndly, To enact certain penalties and forfeitures against offenders, upon the particular conditions, one of which was, that the book should be entered in Stationers' Hall. The entry in Stationers' Hall, is only applicable to the recovery of the penalties and forfeitures, but the vesting of the right, and the protection which the act affords, stands free of any such condition. Indeed, were it otherwise, the inadequacy of the remedies prescribed in this statute for the protection of authors, would be apparent, since, on the one hand, although the statute orders the copies to be forfeited, it also orders them forthwith to be damasked, and made waste paper of. And also, on the other hand, there is a penalty of one penny per sheet; this penalty goes not to the author; but one half to the informer, the other to the king. The consequence of this is, that the author, who alone is injured, receives no indemnification, unless he had some such remedy at common law as the present action of damages. The remedies of the statute can never apply to any other case than that in which the piracy has not been fully accomplished. If the piratical bookseller has sold off his edition, and so accomplished the whole evil, there is no remedy for the author, since no copies remain to be forfeited; and no sheet is to be found in the custody of the person contravening the statute, upon which, in terms of

LORD BALMUTO.—“ I am for adhering.”

Lord President Campbell's Session Papers, vol. 115. *

* Lord Mansfield, in *Midwinter's* case, on a consultation from this country, gave his opinion as counsel in 1748, thus: —“ It was always held that the entry in Stationers' Hall was only necessary to enable the party to bring his action for the penalties.” And he reiterated that opinion in the case of *Tonson v. Collins*, in the Queen's Bench, as a judge.—*Vide Blackstone's Reports*, vol. i. p. 330.

the act, a penalty can be levied. In the interpretation of statutes, concerning crimes and public wrongs, the enactment of penalties may well be considered as superseding all proceedings at common law; but the statute in question was enacted, not so much for the punishment of crimes, as to bestow a private and individual right, and to provide certain remedies for protecting and enforcing it, which, according to the fair rule of interpretation, can never be held as anything else than a cumulative remedy; without which construction, the right, instead of being protected, would in many cases be entirely defeated. The right bestowed by the statute is not a monopoly, but merely a continuance to the author, after publication, of that right, which, till the moment of publication, he indisputably has, and giving him the benefit only for a limited time of the productions of his own genius and labour. It has the effect merely of correcting what is unjust and harsh in the principles of common law, when applied to a new and peculiar species of property. But to admit the competency of an interdict is to acknowledge the principle upon which an action of damages rests. Where the piracy is discovered in time to prevent the publication, an interdict is the remedy. When it is not discovered till afterwards, and the person guilty of the encroachment has made his advantage of it, while the author has proportionally suffered, an action of indemnification is the only remedy. Accordingly, it has always been held, that an entry in Stationers' Hall was only necessary to enable the party to bring his action for the penalties, and it was so found. *Tonson v. Collins*, 1 Black. p. 330, and other cases. 3. The act extending in its operation to both parts of the island, cannot admit of one interpretation in Scotland, and of a different interpretation in England; and the meaning and interpretation given to it by the appellants, have been confirmed by a long train of the opinions of judges, by the practice of the courts of equity, and decisions of the courts of common law in England; and, on a recent occasion, by the Legislature itself; and the rights of individuals, founded upon this meaning and interpretation of the statute, cannot now be shaken without extreme prejudice to the public.

After hearing counsel,

LORD CHANCELLOR (ELDON) said,—

“ My Lords,—

“ The appellants are proprietors of the Works of Burns, the celebrated Scottish poet.

1811.

CADELL, &c.
v.
ROBERTSON.

1811.

CADELL, &c.
v.
ROBERTSON.

"The respondent having pirated parts of these works, the appellants, in 1803, applied to the Court of Session for an interdict against the respondent; and they also brought an action against him, concluding for £200 of damages, and £60 of expenses.

"The bill of suspension and action for damages were founded upon the statutes of Anne, c. 18, relative to literary property, and these actions were conjoined.

"The Court, upon these, pronounced the two interlocutors appealed from of 16th May and 18th December 1804. (Here his Lordship read the interlocutors appealed from.)

"In this cause, it came into discussion in the Court below, as to some of the poems in question, if the exclusive right to them was not expired by lapse of time; and, as to others, if Burns had not himself thrown them open to the public.

"But, on looking into this case with the attention due to it, it clearly appears to me that the Court proceeded entirely on the question, Whether the entry at Stationers' Hall was necessary, in order to give a right to maintain the action or not? One of the judges said, that with regard to some of the works, there was a dereliction of the author's exclusive right, but none of the other judges gave an opinion upon that point.

"The majority of the judges were of opinion, that if a book is entered in Stationers' Hall, the only protection lies in the statutory penalties; but that if the book was not so entered, no proceedings in equity could be had for the protection thereof.

"It is to this point only of the entry in Stationers' Hall that I can call your attention. I am not able to distinguish what poems fall within the other grounds of defence, and what do not.

"The sole question for our consideration, therefore, at present is, if there exists at common law any protection of the right of property given to authors by the statute of Queen Anne?

Donaldson v.
Becket, 4
Burr p. 2408;
2 Ero. P.C.
p. 129.

"The judgment of this House in the great question as to literary property, declared that there was no right of property at common law.

"The act of Queen Anne, in the first section, enacts, that an author should have the exclusive right of printing and publishing his works for the term of fourteen years; and it then goes on to say, that, in case of pirated works, the same should be forfeited and damasked, and made waste paper of, and that for every sheet printed or exposed to sale, contrary to the true intent and meaning of the act, the offender or offenders should forfeit and pay one penny per sheet, one moiety to the crown, the other to the common informer.

"In the next section of the act, it is enacted, that no penalties should be received unless the title of the book was entered in Stationers' Hall; and the whole question in the present case is, If there be, or be not any remedy at law, or in equity, for the publication of a book not entered in Stationers' Hall.

"In the great cause, *Donaldson v. Becket*, in 1774, as to literary property, in this House, there was some difference of opinion among the judges as to the effect of this statute. Mr. Justice Willis 1811.
thought that there was no protection but in the penalty. Mr. Justice Yates was of opinion that the statute gave a right, and that the common law attached remedies to enforce this statutory right. CADRELL, &c.
ROBERTSON.

"In the former case of *Tonson v. Collins*, Lord Mansfield had 1 Blackstone, 330.
given as his opinion, that there was a right at common law to protect the authors given by the statute.

"In the case now under appeal, the judges below were of opinion that the statutory penalties formed the only remedy to an author. I conceive it follows, that if a civil right is given by statute, the party will be entitled to all the benefits known in the common law for the protection of that right, in addition to those in the statute. As a great Lord said (Hardwicke) on another occasion, when penalties in a statute are provided to supply a remedy for a wrong or defect in common law, it was an established rule in England that the judges ought to supply every defect in such a statute, and to complete the remedy intended by the Legislature.

"Upon this subject I know no difference between the law of this country and the law of Scotland.

"It is true there is a remedy given by the statute, but this is not a remedy to the author; the penny per sheet is given one half to the informer, and one half to the crown. The author may indeed destroy what he can seize, but that is no proper remedy to him.

"In the case of *Beckford v. Hood*, in this country, the Court Durnf. and Ald., that although the book was not entered at Stationers' Hall, East's Reports, 7, p. 620.
at the party had at common law his remedy for the protection of his property given by the statute. It was not less his property than it had been entered in Stationers' Hall. This has been understood to be clear in this country ever since.

"Your Lordships also know, that in this country, for a long time past, injunctions have been granted by our Courts of Equity for the protection of books not entered in Stationers' Hall.

"If the judgment in *Beckford and Hood* was wrong, this practice of injunctions has also been fundamentally wrong; if the statute law gave a right to penalties, then there is no reason for an injunction.

"If we look to the words of the statute, we see that there is no right to the penalties given by it, unless the book be entered in Stationers' Hall; but it says nothing as to the civil redress competent to an author. Besides, by the statute, the right to penalties is only given for fourteen years; but as the exclusive right of property is given in a certain event, for a second term of fourteen years, if there is no right at common law for the protection of the property, there would be no protection during the second term of fourteen years. Midwinter v. Hamilton, Kames' Decisions.

"It was said that the case of *Midwinter and Hamilton* had re- June 11, 1748.

1811. ceived a contrary decision in Scotland. This case of *Midwinter* was reversed in the House of Lords upon another point. It was also said there were one or two other decisions in Scotland to the same effect.

CADELL, &c. v.
ROBERTSON. “ But the statute has been uniformly administered otherwise in this country. The judges in Scotland say truly, that they ought not to decide as the judges in England decide, unless they decide rightly and according to the law of Scotland. On the other hand, we may say, that if the judges in Scotland have not decided right, they are not to be followed ; and, in my own view, they have misunderstood the meaning of the statute in this instance.

Ante, vol. i. p. 488.

“ I therefore move your Lordships to declare the meaning of the statute to be according to the English decisions, and that the cause be remitted back to the Court of Session to apply this principle.”

It was therefore declared,

That, although by the act of the 8th year of Queen Anne, entitled, “ An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned,” no person printing or reprinting any book without such consent, as in the said act is mentioned, is liable to any of the penalties or forfeitures thereby enacted, unless the title to the copy of such book shall, before publication, be entered in the register-book of the Company of Stationers, as by the said act is directed ; yet, that the persons to whom the sole liberty of printing books is thereby given, for the term or terms therein mentioned, have, by the said statute, a right vested in them, entitling them to maintain a suit for damages, in case of a violation of such right, and also entitling them to maintain a suit in order to prevent the violation thereof by interdict, for the term or terms for which the statute hath given them such sole liberty, although there shall not have been such entry made before publication as aforesaid. And it is ordered, that with this declaration the cause be remitted back to the Court of Session to review the interlocutor complained of ; and further, to do therein what may be just.

For the Appellants, *Wm. Adam, Sir Samuel Romilly.*

For the Respondent, *No case given in.*

NOTE.—The remit made was as to the other point in the cause, viz. Whether Burns, by sending many of his poems to the newspapers, and publishing them in this fugitive form, was to be held as having *abandoned* these poems to the world, to the effect of barring the protection claimed. Professor Bell, who was one of the counsel

x the appellants in this case, thought this part of the defence better founded; but on the point appealed, (entry in Stationers' Hall), the above judgment was held as fixing the law on the subject, reversing the judgment of the Court of Session.

1811.

CADELL, &c
v.
ROBERTSON.

The case of *Donaldson v. Becket*, referred to by Lord Eldon, was the great Literary Property cause, which occurred in England in 1774; first, in the King's Bench, before Lord Mansfield, and afterwards appealed to the House of Lords. It was different from the present. The booksellers there sought a much larger right—a perpetual copyright at common law after publication, and after the statutory right had expired. In the present case, the claim at common law was made within the statute, and sought a remedy while the statutory right was still current. In the English case, which came first before Lord Mansfield, his Lordship sustained the right at common law, and, when on appeal, the whole judges of England were consulted, five of these declared that there was a perpetual right in the author at common law, and six declared there was no such right. Lord Mansfield, on the case coming before him, on this second occasion, did not vote. Had he done so the numbers would have been equal. He still retained his original opinion, but refrained from expressing it; and the Lord Chancellor Camden, whose opinion was adverse to the common law right, reversed Lord Mansfield's judgment.

Simultaneously with the English case, another great cause, involving the same question of law, was going on and decided in the Court of Session, (*Hinton v. Donaldson*, and other Booksellers). It was decided a short time before the judgment in the House of Lords in the English case; and the Lords of Session came to the same result in denying the common law right. It is stated in *Brown's Supplement to Morison*, p. 508, and by Professor Bell, (*Com. i. p. 119*), that this case was affirmed on appeal; but this is a mistake. The case was never appealed, it being found unnecessary to do so, from the same question, involving similar interests, awaiting a final decision in the House of Lords in the English case.

Though it was so decided in 1774, yet the tendency of legal opinion continued to preponderate strongly in favour of Lord Mansfield's judgment, until, very recently, the case of *Jeffreys v. Boosey*, occurred in the House of Lords (1st August 1854, *H. L. Cases*, 4 . 815), regarding the copyright of Bellini's Opera, "*La Sonnambula*," and in which the Lord Chancellor, and Lords Brougham and Lord Leonard, after consulting the Judges, came to agree in opinion that there was no copyright at common law; so that this question, so long a moot point, may now be looked on as finally settled.

The opinions of some of the judges in the case which occurred in Scotland, above alluded to, being interesting, are given below:—

Opinions of the Judges:—

LORD KENNET.—“ We have had this question very ably stated in

papers, and very fully discussed in pleadings. I do not mean to run through all the arguments;—to support those on the one side, or confute those on the other. I will not meddle with the law of England; in the *first* place, because I do not profess to understand that law; and, *secondly*, because I think it ought to have no influence in determining upon the law of Scotland. I presume the learned judges of the Court of King's Bench gave a just judgment upon the law of England; but they founded very much upon the acts of the Stationers' Company, and the injunctions of the Court of Chancery, with which we in this country have no concern.

"I am of opinion, that literary property is not in the law of Scotland. It is not in the *law of nature*, which is one great fountain of our law. The law of nature is not founded on metaphysical arguments, nor to be deduced from long, abstruse, and abstract reasonings. It must be obvious to mankind, at least, as soon as it is proposed, according to the elegant passage in Cicero, mentioned by Mr. Murray, * 'Est hec non scripta, sed nata lex, quam non didicimus, accepimus, legimus; verum ex natura ipsa arripimus, hausimus, expressimus, *ad quam non docti, sed facti, non instituti, sed imbuti sumus.*' It is in vain to say, that it is founded on that part of the law of nature, by which we are not to hurt another, or take from him what belongs to him; for to apply that is a *petitio principii*. It is not in the *law of nations*: there is not the *consensus gentium*; for it is admitted that no such *consensus* obtains. So far from this we find it to be only such a kind of right as particular states have, in some instances, conferred by a patent, or *privilegium*, for a limited time.—It is not in the law of Scotland, properly so called. I have no *responsa prudentum* for it. It is not even mentioned by the writers on our law, except by Lord Bankton, when treating the statute of Queen Anne. On the contrary, the practice of the lawyers, who took limited patents for printing their works, that they entertained no such idea.—There is no *series rerum catarum*; nay, not one judgment of this Court finding such perty.—There is no statute upon the subject, except the statute of Queen Anne, which appears to me to be against the common right. The rubric, or title of that statute, is clearly against it bears to be an act for *vesting* the right for a certain time is material to consider, that the title at first stood otherwise, to be for *securing*; but it was altered by the Legislature, Stress has been laid on the narrative of the act; but this weakest part of it. The most material part is certainly the clause, which confers the right for a limited time. I add words *no longer*, add nothing to the sense. But then be an express clause, distinctly limited, and quite separate

* Afterwards Lord Henderland, the eloquence of whom this case was much admired at the time.

clause with regard to penalties. The most that can possibly be said upon this clause is, that, if literary property existed antecedently, it does not take it away. But I do not see that it existed at all before the act. The last clause of the act, which provides, that 'the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years,' would have been absurd, if authors were understood to have that sole right *ab ante*. I am therefore of opinion, that there is no right in authors to the sole printing of their works, except what the statute has rationally given."

LORD AUCHINLECK.—"This question is new and interesting: Till very lately, it never received a judgment in any court in Europe. It has received but one, and that in England, the laws of which country are, in many particulars, special to itself; and, when it was there determined, the court was divided.

"We have had the question ably handled in mutual informations, both of them well drawn; in particular, that on the side of the defenders, is a performance which does honour to the author: We have likewise had laboured and long pleadings, and now we are to give our opinions.

"In the entry, I cannot help observing, that it is well said by a wise man, *Nil tam absurdum quod non dicendo fit probabile*. By much labouring any subject, the attention is apt to be drawn away from the real merits, and run into extraneous matter: As I think that has been the case here, and that the diversity of opinions has been owing to it;—in the opinion I am to give, I shall endeavour to confine myself to the proper merits of the case, without launching out into many of the learned arguments which both sides have insisted on.

"I own that the cause, when stripped of extraneous matter, does not appear to me to be difficult. The question is, whether he who writes a book, and publishes it, has, by common law, independent of any statute or privilege granted him by the state, a perpetual property in that performance, in the same way as he had before publishing?

"It is agreed by all, that, while the book is not published, whether the work be in the author's head or his cabinet, it is absolutely his, and no man can deprive him of it. But the question is, if this right continues after publication?

"There has been much said on the necessary consequence from its being once owned to be a man's property, that it should still continue to be so. But, with submission, the reasoning appears to me not just. My thoughts are mine so long as I retain them in my mind; but if I utter them, *nescit vox missa reverti*, every hearer has a right to them as much as I. A man need not speak in company unless he chooses it; but if he speaks, and does not enjoin secrecy, every man may propagate the sayings with impunity. If a man throws out a thing in company, whether instructive or entertaining,

1811.

CADELL, &c.

ROBERTSON.

1811.

CADRELL, &c.
v.
ROBERTSON.

can he maintain that he has a right of property in this *bon mot* to him and his heirs for ever ?

“ And here I beg leave to say, unless it can be shown there is a right of property in what a person utters verbally, there can be none in what he publishes to all mankind by printing it. Indeed, when a man publishes his thoughts, he gives them away still more than the man who utters them in conversation : The latter gives them only to his hearers ; but the former to the whole habitable earth.

“ For illustrating this, suppose several people, well acquainted with this country, should go up to the castle of Edinburgh, and one of them, who liked speaking, should immediately describe all the objects he saw from it, would he acquire a right ever after to that description ? And could he, by printing it, create a right not in him before ?

“ What has created an obscurity in the case, is, that ever, almost since printing began, there have been privileges and grants given as to publications of books ; and men are apt to intermix the notion of these rights with a common law right, a right independent of grants ; and the most part of the argument, in behalf of the pursuer, seems to have been derived from that source, particularly that from what is called *injunctio*, which supposed a right in the complainer to stop a publication.

“ But to come at the certainty ; let us go back to the times before any law was made for privileges to publishers, or any patent granted to them, which is all after printing came in, which happened in the fifteenth century ; and we shall find no attempt made to assert the author's property in any book which he had published. We see, in the learned dissertations delivered in the court of our neighbouring country, stress laid on the king's right to print certain books, and this is said to be a right of property. It is true the king has still a right to print certain books, and he has his own printer ; in the choice of whom great care ought to be taken, which is not always the case ; for I remember, in the year 1745, the same printer officiated for the king and for the pretender : But this right of the king is *prerogative*, not *property*.

“ We had in Scotland, pretty early, licences granted to printers ; particularly there is one in 1567, to *Robert Lickprivick* ; and when your Lordships hear the list of the books which he obtained a special privilege to print, you will judge if they were the king's property. His licence is to print ‘ *Donatus pro Pueris*, *Rudiments of Pelisso*, ‘ the Acts of Parliament, except those of the last part, the *Chronicles of the Realm*, *Regiam Majestatem*, the *Psalms of David*, with the ‘ *English and Latin Catechisms*, *less and mair*, with the buik callet ‘ *Omilies for Reiders in Kirks*, with the general Grammar to be set ‘ out for erudition of *Zouth*.—The privilege to endure twenty years ; ‘ and none to print the said buiks without his consent, under the ‘ pain of the escheat of the buiks, and being fined.’

“ This privilege, and all such, were granted to printers, and were not calculated for the benefit of authors, and not founded on any right of property in the printer.

1811.

CADELL, &c.

“
ROBERTSON.

“ But there is not upon record in any country, not even in England, a patent, or privilege, in favour of any person whatsoever before printing; nor is there at this day any privilege granted to authors, which hinders as many copies to be taken of the work as people choose, provided they be not printed copies: Nay, these gentlemen, the London booksellers, who have obtained so many patents, and even the act of Queen Anne, though they call *printers* who interfere with them *pirates* (a cruel name), never pretend that they can hinder *written* copies to be taken. The law, then, is directed only against printing, and is no restraint from writing; though we all know, that, before the art of printing, there was no other method of spreading books. It was then a great trade. It may be so again; and the London booksellers would have no remedy. This is a clear proof, that the restraint was introduced after printing began, and that it is nowise founded on common law, but on grants; for if it were founded on common law, it would reach against manuscript copies as well as printed ones; and this to me is demonstration, that there is no common law property in authors.

“ And, as a farther illustration of this, let us consider, that anciently very valuable performances were preserved only by the memory. It is said *Homer* was so, and *Ossian*. When that was the case, what privilege could the author have? The poem of *Chenochance*, so much celebrated, and upon which we have a criticism by Mr. Addison, was, in my remembrance, repeated by every body. Was there a *copy* of this little heroic poem? What privilege could the author have in it, after he had let one man get it by heart?

“ Again, as to *extempore* compositions, such as all our sermons in this country were long ago, or were supposed to be, as some of us who are far advanced in life remember; (for at that time a minister who used notes, and would not *trust to Providence*, as it was said, would have been very ill heard); when, as was common, people took them down in writing, as some of them were very good, very entertaining discourses; had the preacher any property in these sermons? He could have none in writing; for he never had written himself: Could he have said, that they were only intended for his own congregation, and were not to be communicated to others? I apprehend the proprietor of these was the person who wrote; for the author was not able to repeat what was in the copy.

“ In short, the whole of the author's plea consists in his claim to restrain from printing; and it is founded on blending the notions arising from privileges and patents with a common law right, which is quite erroneous; and this clearly must put an end to the common law right; for as it is directed only against printing, it is plain, that, before printing, there was no such right; that, to this day, it could

11. not be pleaded against uttering as many manuscript copies as a man chooses; so consequently, it is not founded on common law property.

ALL, &c. v. PATSON. "I have said nothing of the act of the eighth of Queen Anne, for I do not think it necessary; but, if there were any dubiety, that act removes it; for it gives the author a right, under certain conditions, and for a fixed period."

LORD HAILES.—"Authors in England may have a common law right in their works, even after publication."

"So English lawyers have said; so the Court of King's Bench have determined."

"English law, as to us, is foreign law; foreign law is matter of fact. Of the fact I ask no better evidence; for I can have no better evidence than the opinion of the lawyers and judges of that foreign country."

"Whether this common law right be considered as a *property*, or as an *interest*, or as something distinguishable from either, is of no moment."

"If we are once satisfied of the *existence* of a legal right, all inquiry into the *mode of its existence* is superfluous."

"This common law right is strangely interpreted by the London booksellers."

"The Bishop of Gloucester, in his admirable Charge to his Clergy, has bestowed on the London booksellers the appellation of *The Sages of St. Paul's Church Yard*."

"The doctrine of these *sages* is commodious; they *limit* or *enlarge* this common law right as best suits their own convenience."

"They *limit* it, 1. When, maintaining that an author has a right to the *whole* of his work, they take the liberty of borrowing whatever part of the work may be a proper ingredient for their monthly *hashes* of literature, their *Universal Magazines of Knowledge and Pleasure*."

"If a work chances to be short, they retail it in a newspaper, under the appellation of a *criticism* or an *extract*."

"2. Again, they *limit* this common law right, by exciting their dependants to make abridgments of valuable works."

"Herein *Stackhouse*, the author of this day, was an adept: He abridged the discourses pronounced at Mr. Boyle's lectures."

"He and his bookseller would have condemned Donaldson & his associates for encroaching on the common law right of Bentley Gastrel; and yet *he* scrupled not to make, nor his bookseller to publish, an abridgment of the arguments of Bentley and Gastrel in fence of religion!"

"How much of the argument evaporated in this literary pretence of religion!"

"Perhaps an abridger is held to acquire a right by specifying in the work abridged; according to the trite saying,—'Mak recitas, incipit esse tuus.'"

3. They *limit* this common law right, by publishing *Dictionaries Arts and Sciences*—the works of a hundred authors are ransacked: of them is produced, as *the Sages* express it, *an entire new work*. Postlethwayt common-placed the authors who had written of *arts and commerce*. ‘It would be hard,’ says he [article *Books*], ‘were I to be deprived of the fruit of my twenty years’ labour by a crafty pirate.’ That is, it would be hard that any one should steal from me what I have stolen from others.
- To show his consistency, he has transcribed Forbes’s *Treatise on the Law of Exchange*, in so far as relates to Scotland.
- What right had he to plunder Forbes? Yet the London booksellers can see no fault in this as long as they are *proprietors of Postlethwayt’s Dictionary*.
4. They *limit* this right even in prerogative copies. They dare print the text of the English translation of the Bible by itself: it belongs to the king; but they print it with notes, borrowed from Geneva sometimes, but more frequently from Poland.
- Again, they *enlarge* the common law right, and *that* in various ways.
1. It is admitted, that there is no literary property in works whereof the author is absolutely unknown.
- ‘If there ever was an anonymous writer, it is the author of the critical treatise, entitled *The whole Duty of Man*. At this day the sex of the author is problematical.
- ‘Nevertheless, the *trade* have found means to appropriate to themselves a copy in which the pious author pretended no property.
- ‘Dr. Hammond, in his commendatory epistle, observes, that the author had thrown the work into the *Corban*, or common treasury; London booksellers have taken it out of the *Corban*.
- ‘And how? From Dr. Hammond’s commendatory epistle they learn, that Garthwait the publisher had the MS. in his possession when he printed the work; therefore the property of the book is in his heirs or assigns of Garthwait.
- ‘On this momentous discovery, that a publisher was possessed of the MS. which he published, is founded the injunction 1735.
- ‘This, by the way, shows that injunctions have been granted sometimes without much attention to the merits of the cause.
- ‘2. The London booksellers *enlarge* the common law right, by *fettering* the name of *original author* on every *tasteless compiler*.
- ‘Hereof there is an apposite example in *Stackhouse*, the author of this day.
- ‘He was as very a compiler as ever descended from a bookseller’s ret.
- ‘The incorporeal substance of Stackhouse’s ideas is a non-entity.
- ‘And yet, in the opinion of *The Sages in St. Paul’s Church Yard*, Stackhouse is no less an original author than Hooker or Warburton.
- ‘Here lies my first difficulty. Were we to copy the judgment

1811.

CADELL, &c.
v.
ROBERTSON.

1811. of the King's Bench in the case of *Millar v. Taylor*; were we to find that the common law right of authors in England could be made effectual in Scotland; were we even to find that literary property was established in the law of nature and nations, still we could not pronounce judgment for the pursuer, unless we were to hold *Stackhouse* to have been an original author; *this* I can never do.

CADELL, &C.
v.
ROBERTSON.

"But I have still a farther difficulty.—'In this case it is material to consider how the common law of Scotland stood before the statute of Queen Anne.' These are the words of an eminent personage on a similar occasion.

"This inquiry was not *material*, had he understood literary property to be grounded on the law of nature and nations: *that* law varies not in different countries: according to the elegant passage which we heard from the bar, it is not *aliud Romæ, aliud Athenis*; neither was the inquiry *material* if the common law right in England could have had effect in a foreign country.

"The inquiry which that great man thought material has been made.

"Of this right there is not a vestige to be discovered in the law of Scotland.

"From Lord Stair down to Forbes all our authors are silent concerning it. From Lord Stair down to Forbes all our authors have acted as if there had been no such right.

"It is said, 'that the privilege which Lord Stair obtained, prohibiting others from printing his works, did indeed confer nothing upon him, but that his remedy lay by an ordinary action at law.' Strange! that he should have sought and obtained a privilege which gave him no right; and that he should never have mentioned that right which he had.

"It is in vain to say, 'that our authors lived under the despotic sway of a Scottish privy council; and that they were obliged to accommodate themselves to those wretched times.'—The Scottish privy council was not despotic after the revolution; it was a legal court, and legally administered; it was indeed abolished at the union of the two kingdoms, not because it was despotic, but because it could no longer subsist; for the same reason, and at the same time, the English privy council was abolished.

"Many of our authors lived not in *wretched times*. Lord Stair published his corrected work after the revolution; Forbes wrote in the days of Queen Anne; Lord Bankton in the days of George II.

"I dare not pronounce *that* to be a right in the law of Scotland, which has escaped the observation of all our statutes, lawyers, and authors.

"I therefore must give my judgment for the defenders."

LORD GARDENSTON.—"I think we are bound to take notice of the pleadings in this cause. They have been admirable on both sides. The lawyers are entitled to our thanks; and I do not believe that ever this question has been debated with greater ability than by the

Scotch bar. I cannot agree with any of your Lordships who consider this as a clear case. I think it is a nice and difficult question. I own I have been puzzled to fix my opinion. In my first reflection on the argument, I was strongly inclined to embrace the opinion of a literary property. I was moved by the great object of encouragement due to learned and ingenious men. By the apparent justice and reason of a right and property in a man's own works, and the productions of his genius or industry; and I was greatly moved by the authority of a judgment pronounced by a court of high reputation in our neighbouring country. But my maxim is, and ever shall be, *nullius addictus jurare in verba magistri*; and, on the fullest consideration of this matter, I am now of opinion, that authors have in reason and equity a right to be protected in the sole and exclusive publication of their own works for a limited time. But the nature of the thing, and the practice of nations, admits not of a real and perpetual property.

1811.

CADDELL, &c.
v.
ROBERTSON.

"The question in England depended upon the common law of that country. There is no need of argument to prove an undeniable proposition, that we must judge by the common law of Scotland; in which I cannot find a sufficient foundation for this claim of perpetual property in authors.

"There are three fountains from which the common law of Scotland is derived: 1. From certain usages and consuetudes which have been long and uniformly observed; the origin of which in some cases cannot be traced. Our law of deathbed is an example of this. 2. A great fountain of our common law is the civil law of the Romans, in so far as it has been received in our practice, and is evidently just and applicable to cases undetermined in our own law: and some of our statutes mention the Roman law as the common law of Scotland. 3. I admit into our common law every principle of justice, as distinguished from mere obligations of morality, which have been allowed and received as principles of justice by other civilized nations. I have examined this claim of literary property under those different branches of our common law.

As to the first, our usage stands against the plea of a property in authors. It is an upstart property in this country, which authors have never claimed, and our lawyers have never asserted. They have always contented themselves with demanding that limited protection which a patent gave. 2. It is admitted, that there is no foundation for this plea in the civil law, though we find in it the greatest variety, and the most subtle distinctions of property. 3. The principles of reason and justice, as approved by all civilized nations, do support the author's claim to a temporary protection or privilege, not to a property or perpetual right. Upon this ground I chiefly rest my opinion. The most substantial and convincing evidence of what is really just and rational, in a matter of public concern to all countries, is the concurring sense of nations. For above three hundred

1811.
 ———
 CADELL, &c.
 v.
 ROBERTSON.

years, and ever since the invention of printing, all the nations and states of Europe have, by their practice, established the nature of an author's right. They have granted no more than a temporary privilege, and in that they have all concurred. I make no narrow distinctions of Popish and Protestant,—monarchies and free states. It is certain, that since the æra of printing, and of the reformation, even the Popish countries have been greatly enlightened; nor has learning and justice been confined to the Protestant and free countries only. This is the substantial ground of my opinion. I can conceive, in a question of this nature, no authority of equal weight with the sense and concurring practice of civilized nations for ages. The splendid error of one great man may mislead many; but I cannot be easily induced to think, that the concurring sense and practice of nations is erroneous.

“ It does not appear to me that this question is of such importance even to the literary trade of London booksellers as they seem to imagine; and I am clear that authors have no concern in the question at all. The term of legal protection outlives the great bulk of books that are published. Nine hundred and ninety-nine of a thousand have little merit but their novelty: they are once read by idle people for amusement, and are never thought of again. How few books published in the last century are reprinted in this? How few books of this will be reprinted in the next? We had in Scotland some good solid law-books, and books of wild divinity; the latter may exist in some odd libraries. Lord Stair's Institutions has been reprinted, by which, I am informed, the bookseller lost. That book was reprinted without leave of his heirs; indeed I know not how many people must have been applied to, had it been understood to be *in bonis* of Lord Stair; and even the best authors are obliged to sell their works to the bookseller.

“ When I consider this question of literary property upon principles of reason and expediency, I find so many intricacies, something so anomalous and inconsistent in this idea of perpetual property in an author's work, after he has published it to all the world, that I cannot assent to it. The great argument, or *ratio dubitandi*, which I own at first almost convinced me, is, that the author has undoubtedly a property right in the original manuscript composed by himself; why should he lose it by publication, as he intends only to give the instruction or pleasure of reading, not the profit of publication or reprinting? I answer, that certainly the author has a real property in the manuscript of his own work, but, in the nature of the thing, by publication, he gives his work to the public, and he gives the same species of property to every individual who buys his book, which he had in the original copy before publication. This is a natural, a necessary, and a legal consequence of the sale, and it has been so understood and settled by the sense and practice of nations ever since printing was introduced. So that every man who purchases a book, being

thereby unquestionably proprietor, has a right to use it at his discretion ; to multiply the copies by transcribing, or by printing, except in so far as he may be restrained by statute, or the legal interposition of the sovereign, or the equitable injunctions of the civil magistrate.

1811.

CADELL, &c.
v.
ROBERTSON.

“ I have never been able to find a solid and substantial distinction between the right of an author in his book after publication, and the right of a person who invents a machine, after he makes it public. The distinctions which I have heard in the course of this debate, appear to me too metaphysical and immaterial. When I was inclined to the opinion of literary property, and bent to answer this objection, I found it insurmountable; at least, the distinctions are too nice for my discerning, or too unsubstantial for my principles of judging in matters of right. I will draw the comparison in every material point, and I think they coincide exactly. The author has a property admitted on both sides in the manuscript copy of his composition before publication. Is there any doubt that the inventor of a machine, which may be more beneficial to mankind than any book, has also a property in his work before it is made public? It is said, that the author of a book cannot be supposed to intend by publication and sale to part with his property in the literary composition, as contained in the original manuscript; and may it not with equal reason be supposed, that the inventor of a machine does not mean to sell his art or invention? he sells only the individual machine to be used for the purposes which it was contrived to serve. A distinction was made, that the mechanic who makes a machine, after the model of the original inventor, employs his own art and genius; it is an act of imitation which he cannot be barred from exercising; but the act of reprinting is merely mechanical, having no similarity to the author's art or genius. This seems also an immaterial distinction. The most stupid mechanic, incapable of any invention, far less the most sublime and useful, can as easily execute a machine, when he sees the model or original composition, as the most ignorant booksellers and printers can make a new edition of a book without any share of the author's taste or genius. There is nothing can be more similar, than the work of engraving is to literary composition. I will illustrate this proposition by the works of Mr. Hogarth, who, in my humble opinion, is the only truly original author which this age has produced in England. There is hardly any character of an excellent author which is not justly applicable to his works; what composition—what variety—what sentiment—what fancy—invention—and humour—we discover in all his performances! In every one of them an entertaining history, a natural description of characters, and an excellent moral. I can read his works over and over, Horace's characteristic of excellency in writing; *decies repetita placebit*, and every time I peruse them, I discover new beauties, and feel fresh entertainment. Can I say more in commendation of the literary compositions of a *Butler* or a *Swift*? There is

1811. great authority for this parallel. The Legislature has considered the works of authors and engravers in the same light ; they have granted the same protection to both ; and it is remarkable, that the act of Parliament for the protection of those who invent new engravings or prints, is almost in the same words with the act for the protection and encouragement of literary compositions.

CADELL, &C.
V.
ROBERTSON.

“ The strange consequences which would arise from this new doctrine of perpetual property in authors, have been well explained, and have great weight in my opinion. I shall mention some of those consequences which affect me most.—There is either an absolute right of property in authors, or only an equitable claim to protection and exclusive publication for a limited time.—The last is agreeable to the practice of nations ; and, I think, to material justice and expediency. If we admit the first, it is an unlimited right of property, and must have all the effects of property in other subjects. Let us try this literary property, by applying the principles of property in other subjects to it. This is a fair test to discover if it be current and legitimate property or not. There are three material things which concern property : 1. The objects or subjects of it. 2. The manner or mode in which it is conveyed among the living. 3d. The manner in which it is transferred from the dead to the living. The ordinary subjects of property are well known, and easily conceived. We have lands and tenements, houses and gardens, fishings, and moveables of great variety. But property, when applied to ideas, or literary and intellectual compositions, is perfectly new and surprising. In a law tract upon this species of property, the division of its subjects would be perfectly curious ; by far the most comprehensive denomination of it would be a property in nonsense. It must also be branched out into the property of bawdy, blasphemy, and treason. For an instance, we might specify Mr. Wilkes’s property in No. 45, in his licentious Essay on Woman ; and in his abominable writings to inflame and divide the minds of a people united by nature, interest, and government. By the just principles of property, no man can lose his right in whole or in part, without his own act and consent. According to this principle, I cannot think it would be justifiable to translate a book without the author’s warrant ; for thereby you take the benefit and profit of his composition. You take his ideas, his sense and meaning, which is really his literary property, from him ; as if I should take a piece of cloth from a manufacturer, and dye it of a different colour ; I have taken the substance from the owner, the superficial appearance is only my own. This puts me in mind of the method practised by Mr. Bayes in the *Rehearsal*, to appropriate other men’s wit. Mr. Bayes says, ‘ I take a book in my hand ; if there is any wit in it, as there is no book but has some wit, if the wit be in prose I turn it into verse ; this I call *transversing*, and so I make it *my own* ; if, says he, it be in verse, I turn it into prose, which I call *transposing*, and make that

' my own.' Mr. Bayes had a perfect idea of this literary property, and had a method of stealing wit from conversation too. ' I go,' says he, ' where witty men resort ; I make as if I minded nothing—do ye mark ?—if any one says a good thing, pop ! I slap it down ; —and so make that my own too !'

1811.

CADELL, &c.
v.
ROBERTSON.

" If this is a real property, it must be theft to publish an author's work without a right from him. Literary property makes a strange figure in this view. The theft of all other property must be gainful, if the thief escape with impunity ; but this is a perilous theft by the nature of it ; in many cases the thief will be a loser by taking the author's property ; for booksellers know well that many a publication is attended with loss. In most cases, it would be but petty larceny ; at worst, in a very few, the most aggravated and capital crime.—Who steals from common authors, steals trash ; but he who steals from a *Spenser*, a *Shakespeare*, or a *Milton*, steals the fire of heaven, and the most precious gifts of nature.—So we must have new statutes to regulate those literary felonies.

" Let us push this analogy of the principle of property in other subjects a little farther. If the publication of a whole work is theft, to publish parts of it must also be theft ; as a man is undeniably a thief who steals five guineas out of my purse, in which there is twenty : Quotation is therefore literary theft.—I have always believed that the author of a book called the *Elements of Criticism*, is an ingenious man, and a very honest gentleman ; but in this view of the matter, he lies under a very criminal charge ; every page of his book is enriched with quotations from the most classical poets and other authors.

" The most perplexing difficulties would arise by the transmission of this property from the dead to the living. By the principles of our law, a man's moveable estate is understood to lie in *bonis defuncti*, until it is vested in proper form in the person who is entitled to take that succession. It sounds oddly, that a man's ideas and his literary compositions should lie in *bonis defuncti*. Shall learning and genius be vested in an idiot by confirmation ? But there are more serious inconveniencies and incongruities from this perpetual succession in literary property. By the law of Scotland, possession of moveables presumes property, and this property is unembarrassed by any written titles ; but the literary property must for ever be transmitted by titles in writing, and a perpetual progress of title-deeds will be necessary. Though land estates are secured by a proper title, and forty years possession, which cannot be applicable to this species of property, in the course of time, and various successions, it must happen that the property of books must be split and divided among a vast and indefinite number of sharers. No publication can be legally made without the concurrence of all the common proprietors ; for it is an indivisible property, and the inextricable inconveniencies arising from this are apparent. As to the authorities from the law of Eng-

1811. land, I shall say little. We must judge from our own laws, and our own ideas of property. I cannot however think, that the injunctions in Chancery are to be considered as judgments upon the right. Considerations of equity, in particular cases, may afford sufficient ground for a temporary injunction, without supposing a perpetual property. The statute of Queen Anne, which no doubt extends to Scotland, is, in my opinion, no foundation of a just argument on either side of the question; for the saving clause expressly leaves the point of any separate right which authors may claim entire and undetermined.—Upon the whole, I am of opinion, that, by the common law of Scotland, authors have no property or perpetual right in their works after publication; and that it would neither be just nor expedient to allow it.”

CADELL, &c.
v.
ROBERTSON.

LORD MONBODDO.—“ This cause, whatever way it shall be decided, does great honour to our bar; for it has been most ably pleaded, nor do I remember ever to have heard a better pleading. It is a very important cause. It is of importance, as being perhaps the cause of greatest property that ever came before us. The property indeed is immense. We know not the extent of it; and it is of importance in another respect, that it divided the present judges of England; and my Lord Hardwicke would give no opinion upon it. I am to give my opinion with the majority of the English judges. If it had been on the other side, I should have given it with the same freedom.

“ As this cause has been treated, the first question is,—Whether such a property as I contend for, of authors in their works, can at all exist? For a great deal of argument has been used to prove that such a property is a mere chimera, incapable of being defined or ascertained. This part of the argument, I own, surprised me a good deal; for it must be allowed that such a property is given by the statute, at least for a time; and, if it be given by the statute for a time, there is nothing to hinder it to be given by common law for a perpetuity. And the nature of it is sufficiently defined by the statute; for it is there said to be ‘ the sole liberty of printing or reprinting the book.’ It is therefore what every right of property is,—the right of using a thing exclusive of others; and the use of the thing in this case ascertained by the statute is, the printing or reprinting of the book; for there may be sundry uses of the same thing; and as many uses as there are, so many different rights or interests there may be in it. If I purchase a book, I may use it for my instruction or amusement, or I may employ the paper or binding of it as I think proper; and so far I may be said to have the property of it; but I cannot reprint it, because that use belongs to the author or his assignee; and so far he is proprietor. Here is nothing obscure or unintelligible, but it is what every man, even though he be no philosopher, can readily conceive. All, therefore, that we have heard about the absurdity of a property in ideas appears to me to be

nothing to the purpose. Ideas, or *bons mot*, as my brother said, are not by their nature a subject of property ; for property, though it be an *incorporeal* right, it must have for its subject some *corporeal* thing : But, supposing they were capable of property, I allow every man, who purchases a book, to *appropriate* the ideas of it to himself as much as he can, and the words too, if his memory be good enough. I think I could go further without hurting my argument, and admit that he may carry those ideas in his mind, and those words in his memory, to a printing press, and get them thrown off. Such a man I would call a *plagiary*, but not the *pirate* of a book ; nor do I think that he would fall under the sanction of the statute, which only forbids him to use the book for a press-copy, to transfer the author's words from paper to paper by the mere mechanical operation of printing, without any labour of the mind, but does not prohibit him to exercise either his memory or judgment upon it.

1811.

 CADELL, &c.
 v.
 ROBERTSON.

“ This being the nature of literary property, the next question to be considered is, Whether there be such a property at common law, independent of the statute ? And let us begin with the manuscript. — That every author has a property in his own manuscript, has not been denied ; and it has been admitted, that, in consequence of this property, he may, as the law now stands, print it if he pleases. Thus far, therefore, he may reap the fruits of his property ; but these, it is said, are the only fruits he can reap ; for, if the MS. is once printed, and the copy sold, then it becomes *juris publici*, and every man is at liberty to reprint it, and make what profit of it he can. If this be so, the property of a MS. is a property of a very extraordinary kind, of which a man can only make profit once ; whereas other things, which are the subject of property, we may use for our profit as often as we please, and hinder others from interfering with us in that use.

“ Let us suppose that the author, instead of multiplying his MS. by the press, makes several copies of it in writing ; and let us suppose that he gives the use of one of those copies to a friend. This happened in the case of Lord Clarendon's history, and it was there adjudged, that the person who got the use of the copy had not a right to print it, though it did not appear that when he got it he was laid under any restraint or limitation as to the use of it. It is true, indeed, that the person in that case got the use of the MS. for nothing. But would it have altered the case, if Lord Clarendon's heir, in consideration of the expense or trouble of transcribing the MS., had made him pay something for the use of it ? Or suppose that, instead of transcribing it, he had taken the more expeditious way of making copies of it by the press.

“ It appears, therefore, that, by giving the use either of MS. or book for hire, or without hire, I do not give the liberty of printing or reprinting it, even though no such condition was mentioned ; and so it was adjudged by my Lord Hardwicke in the case of a *Letter*, of which the man, to whom it is written and sent, appears to be as

1811. much proprietor as any man of any book or MS., and yet he is not entitled to print it. I hold it to be part of the contract of emption, when a book is sold, that it shall not be multiplied. If, in the sale of a book, it were made a condition, that the buyer should not reprint it, all your Lordships would be of opinion that he would not have that right. Now I say, that, in the case of a printed book, it is not only *understood* that the possessor of it shall not reprint it, but it is *expressed*; for the title-page bears that it is printed either for the author, or for some bookseller, to whom he has assigned the right of the copy; the meaning of which cannot be, that the author or bookseller has a right to the copies already printed (for, as they are in his possession, such advertisement is altogether unnecessary), but to intimate that he has the sole right of printing: so that the selling a book with such a title is in effect covenanting that the purchaser shall not reprint it.

CADELL, & CO.
v.
ROBERTSON.

“The common law of Scotland and England must, I think, be the same in this case, as the common law of both is founded upon common sense, and the principles of natural justice, which require that a man should enjoy the fruits of his labours: for it is certainly contrary to justice that a man should employ perhaps his whole life in composing a book, and that others should enjoy the profit of printing and publishing it, ‘to his very great detriment, and too often to the ruin of him and his family,’ as is said in the preamble of the statute.

“It has been said that literary property is unknown in this country, and was not known till of late in England: That in this, and other kingdoms of Europe, authors did formerly secure to themselves the profit of their works by getting patents from the crown, with the exclusive privilege of printing them for a certain number of years; and particularly our great lawyers, Sir George Mackenzie, Lord Stair, and Lord Dirleton, took patents of this kind for the printing of their works.—To this I answer, that, in those times, the licensing the press was held to be part of the prerogative. Sir George Mackenzie has expressly said, that it was *inter regalia*. No man, therefore, had then a right to print any thing without the permission of the king; so that every copy of a book was what is now called a prerogative copy; and upon this foot matters still continue in the other kingdoms of Europe. But in Britain, it is now admitted, that the king has no such prerogative, except as to Bibles, common prayer books, or law books, which cannot yet be printed without his permission; of such books, I think, the king may be properly enough said to have the property, which, as it is defined by the statute, consists in the exclusive privilege of printing; and accordingly I see, that in England the king’s right to prerogative copies is maintained upon the principle of property; and the same right that the king has to those books, every author has to the book he writes, now that the encroachment of the crown upon the liberty of the press

is at an end. And thus I think a very good reason may be given why authors have now a right in their works which they were not supposed to have before.

“The reprinting a book has been compared to the imitating or copying of an engine, which every man may do, if the inventor has not secured to himself the property of it by a patent. But the cases are very different; for the printing of a book is a mere mechanical operation, which a man may perform without understanding one word of it; whereas no man can copy an engine, unless he have in his mind the idea of that engine, and know the purpose for which it is intended, and the mechanical powers by which it operates. Now, so far as concerns ideas, and every operation of the mind, any man who purchases a book is absolute master of it: but with respect to the multiplying of copies by the mechanical operation of the press, that belongs only to the author; and in the same way the imitating a print or copperplate is to be distinguished from the printing a book, or the taking an impression of the copperplate. This last is a mere mechanical operation like printing; whereas the imitating a copperplate by engraving a new plate, is like copying a picture, a work of some taste and genius, and often very ill performed. Every man, therefore, was at liberty to engrave any print, though it had been invented and first engraved by another, till he was prohibited by the act 8th Geo. II. But as the two operations of engraving and printing are so different, no argument can proceed from the one to the other.

“The last thing to be considered is, whether, supposing a right to exist at common law, it be taken away by the statute. And I have the satisfaction to find, that the judge in the Court of King’s Bench, who was single in his opinion there, as I shall probably be here, did not think it was taken away if it did once exist. The argument drawn from the word *vesting* in the title of the statute, to prove that authors had no right before, is not at all conclusive; for the same word occurs in the title of the act annexing the estates lately forfeited to the crown, which, however, did certainly belong to the crown before that act was made. The word, in both titles, signifies nothing more than that a fuller right was given, and of more ready execution than what was given by the common law; besides, the title of an act is but once read, whereas the preamble is thrice read, as well as the rest of the act. Now, in the preamble of this act, the right of an author to his work is asserted in express terms; and if there was any doubt in the matter, it is removed by that proviso in the end of the act, by which it is declared, that nothing in the act shall either prejudice or confirm any right claimed by any person to the printing or reprinting any book or copy. This leaves the matter just where it was before the statute, and appears to have been intended to obviate this very doubt, whether the right which formerly belonged to authors was not taken away by this statute, giving them a new right, I mean a right secured by penalties and forfeitures.

1811.

CADELL, &c.

v.

ROBERTSON.

"As to the alleged inconveniences of literary property, the clearest principles of law may be attended with inconveniences ; but that consideration belongs not to us, but to the Legislature. Here, however, I see no inconveniences ; on the contrary, were there not such a property, such a right, there would be great inconveniences, great injustice. I think it would be very hard, and much to the discouragement of literature, if an author, after spending a laborious life in composing a book, did not provide by it, not only for himself, but also for his family : Nor is the remedy in the statute against this evil sufficient ; for the best books may be twenty years published without having their merit known, and afterwards have a great and universal sale. The copy of Milton's *Paradise Lost* was sold for fifteen pounds, and it is probable that the bookseller lost by it ; for it is certain, that the people of England know that they had in their Lord Somers let the people of modern times.

"Upon the whole, therefore, I am of opinion, 1mo, That authors had a right of property in their works before this act was made ; 2do, That such right was not taken away by the act."

STUART MENZIES of Culdares, an Infant,	} <i>Appellants ;</i>
and the Hon. HENRY ERSKINE and Others,	
his Guardians,	} <i>Respondents.</i>
Mrs. ELIZABETH MACKENZIE BERESFORD	
(formerly MENZIES), and JOHN CLAUDIUS	
BERESFORD, of the City of Dublin, Esq.,	
her Husband,	

House of Lords, 20th July 1811.

ENTAIL—FETTERS—INSTITUTE, OR HEIR OF TAILZIE.—He question was, whether the party first called in the entail wasstitute or an heir of tailzie ? In the first part of the deed (mention of heirs of tailzie) he was called expressly as an heir of but in the latter part of the deed of disposition he was called institute or fiar. Held him not subject to the fetters of tail. Affirmed in the House of Lords.

The particulars of this case are reported, ante 242.

The case was remitted from the House of Lords to the Court of Session, to review the interlocutors which had pronounced, and which were appealed from.

On resuming consideration under this remit, the Court of Session ordered mutual memorials on the whole

After these were given in, the Court pronounced this interlocutor:—"The Lords having, in obedience to the remit
 " from the House of Peers of the 30th day of June 1801, re-
 " viewed the interlocutors of the 24th day of June and 6th
 " December 1785, heard counsel for the parties in presence
 " thereon, and advised the mutual memorials and other
 " writings, and proceedings in the cause; they find that
 " James Menzies of Culdares, although nominated as heir of
 " tailzie by the first part of the deed 1697, being made
 " disponee or institute by the latter part thereof, was not
 " comprehended in the prohibitory, irritant, and resolute
 " clauses imposed on the heirs of tailzie of the grantor, and
 " that this is the case as to the whole estate comprised in
 " the deed 1697, including such part thereof as was com-
 " prised in the charter 1675, and therefore adhere to the
 " foresaid interlocutors of the 24th day of June and 6th day
 " of December 1785."

1811.

—
 MENZIES, &c.
 v.
 BERNARD,
 &c.
 Jan. 18, 1803.

The appellants conceiving themselves aggrieved by the judgment, brought the present appeal, not only against the former interlocutors, but also against the one above quoted.

Pleaded for the Appellants.—It is perfectly clear, from the general tenor and conception of the deed 1697, as well as from various passages in it, that it was the intention of the maker to subject James Menzies, the person who was first to take, to the observance of the conditions prescribed, and to lay him under the restrictions specified, as much as any other person or substitute who was to take after him, and that the maker did conceive that he had so subjected James Menzies, as well as the rest, when he imposed the conditions and restrictions *upon the heirs of tailzie generally*.

Thus he begins by nominating the said James Menzies, and the heirs male of his body, whom failing, the other persons favoured to be his (the granter's) heirs of tailzie and provision. Then, for farther security of the heirs so nominated, he conveys to the said James Menzies and the substitutes, the different estates. He next appoints a moiety of the rents to be paid to Captain Archibald Menzies during his life, and the other moiety, after payment of his debts, to the *heirs of tailzie above mentioned*, to whom the fee is hereby appointed to belong, in their order, which must either be applied to James Menzies, or it must be held that the granter meant to give James nothing in fee of the estate. He then reserves power to burden the heirs of tailzie above mentioned, not meaning surely to exclude James Menzies,

the first to take, from a share, and the principal share, for sustaining the burdens. Then comes the restrictions: "It is, &c. shall not be lawful to any of the heirs of tailzie contained in the foresaid nomination, James Menzies being expressly called as an heir of tailzie in the nomination." And in this clause it will be observed, that the word *heirs* and the word *persons* are used indiscriminately, and applied as well to James Menzies as the rest. And the deed concludes with the following clause: "And which persons *successive* aforesaid, I design, nominate, and appoint to be served and retoured, and to have right to my said whole lands, &c. as heirs of tailzie and provision to me." On the part of the respondents, it is not denied that the granter meant to comprehend James Menzies; but they say intention is nothing unless it is properly executed; and they refer to a variety of decided cases, where it was adjudged that restraints imposed upon heirs of tailzie did not reach the disponee or institute, who is not, technically speaking, an heir of tailzie. They rest on the doctrine laid down in the noted case of Edmonstone of Duntreath. "That the appellant being *fiar* and disponee, and not an heir of tailzie, ought not by implication from other parts of the deed of entail, to be construed within the prohibitory, irritant, and resolutive clauses laid only upon the heirs of tailzie." The appellants certainly have no wish that your Lordships should unsettle any decided case, or give a different judgment in a similar case, however much the justice and propriety of the principle which governed those decisions, may now be doubted; but the appellants submit that the present case is essentially different from any one that has gone before. Here there is no attempt to subject one, who, by the terms of the deed, is only a *fiar*, *disponnee*, or *institute*, and not an heir of tailzie, to the prohibitory, irritant, and resolute clauses, by *implication* from other parts, but here is a person expressly named heir of tailzie, and, as such, expressly subjected. He is rightly and technically so called in one part, though perhaps not with perfect propriety so denominated in another part, while undeniably meant to be described by that denomination in every part. Your Lordships cannot put the first part of the deed wholly out of view, and decide on the after part of it. The first part is the nomination of heirs of tailzie, and James Menzies is called there as an heir of tailzie.

Pleaded for the Respondents.—1. James Menzies, 1

respondent's grandfather, was in no shape an heir of entail, under the deed 1697, fettered by the prohibitory, irritant, and resolute clauses therein contained, but disponent, or institute, against whom these clauses neither were directed, nor could by implication be extended. 2. That as such disponent or institute, he had full power to have defeated the entail 1697 *in toto*, much more was he enabled to execute the supplementary entail now in question, agreeing in all respects with the original entail, and only adding to the substitutions thereof a certain series of heirs to succeed when the former should be exhausted.

1811.

KIRKPATRICK,
&c.
v.
SIME.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Wm. Adam, John Clerk.*

For the Respondents, *Sir Sam. Romilly, Jas. Abercromby.*

NOTE.—Unreported in the Court of Session.

[Fac. Coll. vol. xiii. p. 339.]

JOHN KIRKPATRICK, Esq., Advocate, Residuary Legatee of JOHN SIME, Ship-builder in Leith, deceased, and MRS. ISABELLA KIRKPATRICK, Mother of the said John Kirkpatrick, } *Appellants;*

MARGARET SIME, Sister consanguinean of the said John Sime, deceased, and only surviving child of the deceased John Sime, Senior, Ship-builder in Leith, } *Respondent.*

House of Lords, 22d July 1811.

LEGITIM—HOMOLOGATION—HERITABLE OR MOVEABLE—PARTNERSHIP.—(1.) A father, in his settlement, left all his heritable and moveable property to his son, who was in partnership with him as a ship-builder. This settlement was burdened with an annuity of £50 to his only daughter. The daughter never received her annuity; but for twenty-one years resided with her brother in family. After her brother's death, and twenty-one years after the death of her father, she claimed her legitim as due at his death. Held her entitled to it, and that she had not homologated or approved of the deceased's settlement.

(2.) In computing the legitim: Held that certain heritable subjects, though vested in the father's name, as an individual, belonged to

1811. the partnership, and as such were to be held as moveable estate,
as in a question of succession, and therefore subject to her legitim.
KIRKPATRICK, In the House of Lords, this last point remitted for consideration,
&c. with doubts expressed.
v.
SIME.

After the respondent's father, the deceased John Sime, senior, shipbuilder in Leith, died, her brother, who had been in partnership with him in business, intromitted and possessed himself of his whole real and personal estate; and the present claim was an action raised by the respondent against the appellant, the trust-dispensee of her brother, who shortly thereafter also died, claiming, 1st, Her legitim out of her father's estate. 2. A share in certain heritable subjects held by the copartnership, in which her father and brother were sole partners.

It appeared that the respondent was the child of the first marriage of John Sime, senior, and John Sime, junior, a child of his second marriage. That some time before the father's death he had executed a settlement of certain heritable subjects acquired by him, in the following terms: "in favour of himself and Margaret Hog, his spouse, in conjunct fee and liferent, for the said Margaret Hog her life-rent use alienably, and to the said John Sime, junior, their only son, his heirs and assignees whatsoever, heritably and irredeemably," &c., with reservation, however, of full powers of property in the subjects in favour of himself. Upon this disposition infestment passed.

11 July and
Sept. 1749.

About the same period Mr. Sime acquired five other subjects in North Leith, and, by disposition and sasine, of these dates, these subjects were conveyed by the vendors in the same terms as above mentioned, and the titles to these completed by charter and infestment.

Mar. 25, and
April 15, 1749;
April 15 and
20, 1749.

At an early period, many years before his death, he had constructed, upon a part of the ground so held, a dry dock, and other accommodations connected with it, in which he carried on his trade of a ship builder.

April 19, 1776.

Of this date, he executed a testamentary deed of general disposition and assignation, by which he "gave, granted, assigned, and disposed to and in favour of the said John Sime, my son, his heirs and executors, or assignees, not only all and sundry lands and tenements, houses, annual-rents, dry docks, tacks, or other heritable subjects whatsoever, presently pertaining and belonging to me, or which shall pertain and belong to me at the time of my decease, but also all and sundry goods, gear, debts, sums of money

" &c., or *other moveable* subjects whatever," under burden of a liferent annuity to Janet Lawson, his third wife, provided by contract of marriage, "*as also an annuity or life-rent of £50 to Margaret Sime, my daughter, during her life,*" &c.

1811.

KIRKPATRICK,
&c.
v.
SIME.

Mr. Sime survived the execution of this deed about nine months, and died in January 1777. He left issue John Sime, junior, and the respondent. It has been already seen that John Sime had, for many years before his father's death, been assumed as a partner, and that they carried on a joint trade as ship-builders, under the firm of "John Sime & Son."

Under the settlements above mentioned, John Sime, jun., paid regularly the annuity to the deceased's widow; but with reference to the respondent, it was alleged, that she lived with him in family, and in this way received her board in lieu of her annuity, with whatever sums and necessities she had occasion for or demanded.

Matters continued in this situation until 1796, when John Sime, junior, died.

In March 1789 he executed two deeds, by which he conveyed, after his death, all his estate, real or personal, to certain trustees, for the following purposes: 1. For paying his debts. 2. For paying a legacy of one thousand guineas to each of his two natural children. 3. For paying an annuity to the appellant Mrs. Isobel Irving, wife of William Kirkpatrick, Esq.; and, 4. Of conveying to his son, the other appellant, John Kirkpatrick, when he should become of age, the residue of his estate.

Upon the death of Mr. Sime, junior, the only surviving trustees who accepted were James Balfour, W. S., and John M'Laren of Leith, and they entered on the management of the trust.

In June 1797 the present action was raised by the respondent against the surviving trustee and the appellant, concluding, first, for her annuity since her father's death, under deduction of £25 per annum for maintenance; but this action was afterwards abandoned, or changed for a claim of £5000, or whatever other sum should be found to be due to her as heir, executrix, or nearest of kin, or as only surviving child of her father's first marriage.

The Lord Ordinary ordered her, by interlocutor, "to give a special condescendence of what she claims from the defender, as trustee of the late Mr. John Sime, either as

1811. " bygone annuities, in virtue of the settlement of her father,
 KIRKPATRICK, " or as her share of the effects that might have belonged to
 &c. " Margaret Gordon, her mother, or for her legitim out of
 v. " her father's effects.
 SIME.

The respondent, accordingly, gave in a condescendence, claiming as legitim, one half of the whole amount contained in the inventory of the personal estate given up by the son after her father's death in 1776.

May 28, 1800. The Court, on report of Lord Polkemmet, pronounced this interlocutor: " The Lords find the pursuer entitled to her legitim; but remit to the Lord Ordinary to hear the counsel for the parties on the amount thereof, and the other particulars in the cause, and to do as he shall see just."

This having been decided, a discussion then took place as to its extent.

Nov. 12, 1801. The parties stated the case in memorials, and the Lord Ordinary pronounced this interlocutor, " Finds that a copartnery in the trade of ship-building subsisted between the father and son, John Sime, senior and junior, for a number of years: Finds it instructed by the inventories made up at four different periods, that the whole property, both heritable and moveable, contained in said inventories, fell under this copartnery, and was understood between the father and the son to be their joint pro-indiviso property, in equal shares, both as to stock and profits: Finds that the assumption of the son into this copartnery, whereby the father, in his lifetime, had bestowed on him one half, or nearly so, of his whole substance, is to be held as a virtual and effectual forisfiliation of the son, so as to exclude him from any after claim of legitim at his father's death: Finds that by the father's death the copartnery was dissolved, and that there then fell to be an equal division of the property thereof, one half of which belonged to John Sime, junior, *proprio jure*, and the other half fell to be taken up by the father's representatives: Finds that the plea of the pursuer that the father's interest in the whole copartnery, subjects, and effects, is to be held as moveable or personal right, falling under his executry (though applicable to the case of a copartnery, or trading or manufacturing company, so constituted as not to be dissolved by the death or bankruptcy of one partner, and where the share of the deceasing, or bankrupt partner, is to be drawn out, according to a certain

“ valuation), does not, however, apply to this case, where
 “ the father’s death effected a total and absolute dissolution of
 “ the copartnery; so that his share of the property thereof did
 “ thereby become descendible to his representatives, accord-
 “ ing to the general rule of law as to heritable or moveable
 “ succession: Finds that such part of the father’s half of
 “ the copartnery property as was heritable fell to John
 “ Sime, junior, as disponent by the father’s settlement in his
 “ favour: Finds as to the father’s moveables, that the half,
 “ or dead’s part, fell likewise to John Sime, junior, in virtue
 “ of said settlement: Finds that the other half, as legitim,
 “ fell wholly to the pursuer, her father’s only remaining
 “ child *in familia*, in consequence of the son’s *foris familia*-
 “ tion aforesaid: Finds the pursuer entitled to said legitim,
 “ with interest thereof from her father’s death: And finds,
 “ that the long lapse of time which intervened between the
 “ opening of the pursuer’s claim, and its being first insisted
 “ on, affords the defenders no plea of favour for a restriction
 “ of the interest or otherwise, in respect there is no appear-
 “ ance that John Sime, junior, did ever communicate to his
 “ sister, the pursuer, the contents of their father’s settle-
 “ ment, or ever applied for acceptance of the annuity in
 “ place of her right of legitim. As to other matters of con-
 “ troversy between the parties, renews the remit to the ac-
 “ countant in the interlocutor of the 12th Nov. 1799; the
 “ report to contain a state of the amount of the pursuer’s
 “ legitim, upon the principle of this interlocutor.”

1811.

KIRKPATRICK,
 & CO.
 v.
 SIME.

Both parties having represented, the Lord Ordinary re-
 presented the cause to the Court, who pronounced this in-
 terlocutor:—“ The Lords find that there was a subsisting Nov. 17 and
 “ partnership between John Sime and son, in consequence 22, 1803.
 “ whereof, John Sime, junior, had right, *proprio jure*, to one
 “ half of the partnership funds: Find that the dock and perti-
 “ nents thereof, which were used in the business of the
 “ partnership, must be held as sunk in the company’s estate,
 “ and moveable as to every question of succession: Find
 “ that the son’s claim of legitim remained entire, in respect
 “ the same has never been discharged, without prejudice to
 “ any claim of collation, at the instance of his sister Marga-
 “ ret, who is also entitled to her claim of legitim, with inte-
 “ rest from the time of her father’s death; but subject to a
 “ reasonable deduction for board, clothing, and other articles
 “ furnished to her while she lived in family with her bro-
 “ ther, and remit to the Lord Ordinary to proceed accord-
 “ ingly, and particularly to hear parties with respect to the

1811. "tenement of houses which was not used in the business of
 ——— "the copartnery, though entered in the inventories referred
 KIRKPATRICK, "to, and likewise with respect to the share in the Ropery
 &c. "Company, whether these subjects fall under division or
 v. "not, and in what manner, and do as he shall see cause."
 SIME.
 March 1 and A petition by the trustee against this interlocutor was re-
 2, 1804. fused.

The cause having gone back to the Lord Ordinary, he ordered an interim payment to the respondent of £500.

The appellant, John Kirkpatrick, arrived at majority on the 23d Nov. 1806, and Mr. Balfour, the trustee, died on the 24th of the same month.

And then the appellants brought the present appeal to the House of Lords against the above interlocutors.

Pleaded for the Appellants.—1. Legitim is that share of the moveable effects of a father, which, at his death, belongs to his children *proprio jure*, and which he cannot dispose of by will. This right may be discharged with the marriage settlement of the parents, or it may be renounced by the children in the father's lifetime; or, if the father makes a general settlement of his moveable estate, by which he disposes of the subject of the legitim as well as the rest, and in lieu of the legal claim of his children, settles special provisions upon them, they may, by acceptance of the provisions given, approve of the settlement, or by other acts of *homologation*, render it effectual, and bar them from claiming the legitim.

In the present case, the right of legitim was effectually excluded by a long course of acts of homologation of her father's general settlement, which bestowed on her a separate and reasonable provision. The general doctrine here stated is completely fixed in the law of Scotland, and it is therefore superfluous to cite authorities in support of it. Both Stair and Erskine declare that this claim is effectually barred by their acceptance, homologation, or approving of their father's settlement, whereby a lawful contract is established between the father, or those deriving right from him, and the children having right to legitim, which is effectual against them. The law standing thus, it is to be considered, Whether the respondent, Margaret Sime, did homologate her father's settlement, and is therefore barred from claiming legitim. The appellants have not been able to discover whether there was any contract of marriage in which the legitim was discharged, or whether the respondent herself had discharged that legitim; but as the pre-

Stair, B. iv.
 tit. 40. § 29;
 Ersk. B. iii.
 tit. 3. § 47.

sent claim of legitim was not brought by the respondent till twenty-one years after the death of her father, and when she was approaching to the age of seventy, it could not be expected, even if such a discharge existed, that it should have been preserved or recovered by the appellants. The claim was not brought until after the death of John Sime, junior, to whom alone the facts could be accurately known, and, in the mean time, the whole books and papers of Mr. Sime, junior, had been in the hands of various persons, amongst others, the agents and friends of the respondent.

1811.

KIRKPATRICK,
&c.
v.
SIME.

But it is submitted that the facts in evidence, or admitted, import in law a renunciation of the right of legitim, and an homologation of the general disposition of John Sime, senior, with the burden of an annuity to the respondent. John Sime died in January 1777. His deed of settlement was recorded in the books of the Court of Session, a few weeks afterwards. This was for the purpose of publishing, as well as preserving it for the use of all concerned. Mr. Sime's *third* wife, whose annuity was confirmed by that settlement, lived in family with John Sime, junior, and Margaret Sime, the respondent. It is impossible to doubt, therefore, that the nature and contents of the deed must have been distinctly known to them all. It cannot be supposed, as the respondent has alleged, that she was ignorant, during all her brother's life, of the nature of her father's settlement. That supposition is inconsistent with the idea of her being possessed of any degree of understanding. If, therefore, she knew of the settlement, (and of this there can be no doubt), she must be held as having acquiesced in it. Her total silence during her brother's life, after the death of her father, for a period of twenty-one years, can admit of no other construction.

But the respondent's knowledge of the settlement is not left to probability, because it is proved and established by the summons, which sought payment of it, under deduction of £25. The respondent being in the knowledge of this fact, continued to live in the house of her brother from her father's death in 1777 till the brother's death in 1796, a period of nearly twenty years. During all that time she received maintenance, money, and clothes, and every thing she required. It must be held, therefore, by these acts, and by long silence, she had acquiesced in and approved of the settlement of her father. A claim, therefore, of legitim, so long after the father's death, and even after the death of his universal donee, is one that has been scarcely ever

1811. heard of before. But, 2. Legitim is due only out of the
 ———— moveable estate of the deceased, and, supposing she were
 KIRKPATRICK, held entitled to legitim, the dry-dock, and other subjects
 &c. described as pertinents thereof, conveyed to John Sime,
 v. junior, by the general disposition of his father, were not
 SIME. part of the *moveable* estate of John Sime, senior, but constituted a real and heritable estate in his person. It cannot be disputed, in point of fact, that at the date of the general disposition of John Sime, senior, in 1776, and also at his death in 1777, the dry-dock and pertinents, with various other subjects, stood feudally vested in the person of John Sime, junior, his heirs and assignees whatsoever, under reserved powers to the father.

But it is clear that the effect of an investiture in these terms is, that the husband and father is sole *fiar*, and neither will any attempt be made to deny this proposition. It seems therefore to follow, in the simplest manner possible, from the undeniable state of the law, and the undeniable state of fact, that the subjects in question, *being an heritable estate* in the person of John Sime, senior, at his death, could not be liable to any claim of *legitim*. But though none of the points here stated can be disputed, it is maintained that the dock and pertinents had been made part of the stock in trade of the company, of which John Sime, senior, and John Sime, junior, were partners; and that, in point of law, though the subjects constituting the stock in trade of the company, may be in their nature heritable, the shares of a partner in that stock is moveable and personal property. But there is no evidence to show, that it was the intention of father and son, that the dock, and any of the heritable subjects vested in the former as an individual, should, in any sense, become a part of the stock of the company, to the effect of giving them, or their executors, an interest in these subjects. 3. Besides, there is no solid principle on which a real or heritable estate, vested in a copartnership, can be held to be moveable or personal estate in the individual partners, to the effect of their interest therein being transmitted to their personal representatives. The rule is quite different in England, for there each individual partner's share continues to be real estate in him; so they maintain that though opinions to the contrary may have been entertained in Scotland, yet no judgment of the House of Lords has ever countenanced those opinions.

Pleaded for the Respondent.—1. In regard to the legi-

tim, it appears to be quite clear and settled in many cases, both in the Court of Session and House of Lords, that no voluntary instrument executed by the father *mortis causa*, can disappoint a child of legitim. The legitim belongs to the children by law, not to the father, and he can never dispose of it by any deed which is to have effect only at death. Therefore, the general disposition and assignation executed by John Sime, the father, had not the effect to cut off the respondent's right of legitim. This is now so well known, that it is only necessary to refer to the following authorities, Stair, B. iii. tit. 4. § 34; Erskine, B. iii. tit. 9, § 16; Allan v. Allan, 17th June 1762, (Mor. 8208). Lawson v. Lawson, 6th February 1777, (Fac. Col. vol. vii. p. 367); Lashley v. Hog, (in the House of Lords) 16th July 1804, *vide ante*; Millie v. Millie, (in the House of Lords, 18th March 1807, *vide ante*). Nor is there any pretence for saying that the respondent, by any act of hers, had homologated her father's disposition. Had they produced receipts for the annuity of £50, for the whole, or any part of the twenty-one years, this homologation or approval of the father's settlement, might have been pleaded with some show of reason, but here there is not the least vestige of anything of that kind, nor of any act to which the law usually attaches the legal consequences of acquiescence.

2. In regard to the heritable subjects belonging to the partnership, the argument of the respondent applies to all those subjects given up in the inventories. These heritable properties were used in the business, and, from their very nature, connected therewith. The dry-dock, and the share in the rope-work, were so connected as to be a part of the company stock. Other heritable subjects were not so used in the business, and not so connected, but they were given up in the inventories. Now, although there was no copartnership here to establish what was stock, and what not, belonging to the company, yet this matter was completely established by certain extracts from the books of John Sime and Son, produced by the appellants in the Court of Session. These extracts consist of inventories of the partnership funds and debts, made up from time to time. The stock of this company, like all other mechanical concerns, consisted of the materials used in the trade, and therefore the very extensive houses and docks which had been purchased and fitted up for the purpose of carrying on the business, as well as the two shares in the Leith Ropery Company, which it

1811.

KIRKPATRICK,
&c.
v.
SIME.

1811. KIRKPATRICK, &c. v. SIME. had been considered advantageous for the copartnery to hold, as being so much connected with their own business of shipbuilding, and the debts due to the company, are what is divisible into two shares, the one half belonging to the respondent's father, upon which her claim of legitim attaches. 3. The decisions in the Courts of Scotland have been uniform in holding that the heritable estate belonging to a copartnership, used in carrying on the business of the concern, is moveable, both in questions with creditors as in questions of succession. It was so held in *Crooks v. Tairse*, 29th January 1779, Fac. Col. (vol. viii. p. 113, et M. 14596). When an individual partner dies, his interest in the copartnery is not taken up by service, although a great part of the company's estate may consist of heritable subjects, but solely by a confirmation. *Vide Murray v. Blackwood*, 25th July 1700, Forbes, vol. i. p. 368, (et Mor. 5478); *Dalrymple v. Halket*, 1st July 1735, Dict. vol. i. p. 368, (et Mor. 5478); *Murray v. Murray*, 5th February 1805, Fac. Col. vol. xiii. p. 441. To this effect it does not signify in what manner the feudal title may be vested, whether in one individual or another.

It is sufficient that it belongs to the company as a part of the copartnery property. Partners have no claim upon it of an heritable nature. They have no *pro indiviso* possession, no right to the *ipsum corpus*. It is only a *jus crediti* that they possess. They have merely a right to a share of the *jus incorporale*, and not of the individual subjects; and therefore stock in trade is moveable.

In the inventories of the partnership, made up in 1774 and 1776, before the father's death, there appears the following, among other Company stock and funds, "Houses, prime cost, £2000; dock, prime cost, £2000; Leith Ropery Company, two shares, £500," and these inventories ought to be conclusive.

After hearing counsel,

LORD CHANCELLOR (ELDON) said,—

"My Lords,—

"The first interlocutor in this cause, to which I need call your particular attention, is that of the Lord Ordinary, of the 12th of November 1801. (Here his Lordship read the interlocutor). I must call your particular attention to one or two particulars contained in this interlocutor. It finds, first, That the whole property, heritable and moveable, of John Sime, father and son, fell under the

copartnership, and that this was instructed by the inventories therein mentioned. These inventories were made up at the different periods of 1770, 1771, 1774, and 1776. The language of them is, 'We have in ready money,' &c. (Here his Lordship read the inventories, particularly noticing the words, 'Houses, prime cost, £2000; dock, prime cost, £2000; Leith Ropery Company, two shares, £500). I wish to call your attention particularly to this, because this interlocutor considers all the property mentioned in these inventories as joint property, in virtue of some supposed previous agreement instructed by these inventories.

"The Lord Ordinary takes a distinction between a partnership ending by the death of one partner, and one where a partnership would not be so dissolved. He considered that in a case of A. and B. being copartners; and A. dying, his next of kin would take the share of the personality of the copartnership, and his heir his share of the real estate; B. retaining his own share of both.

(His Lordship now read the interlocutor of the Court of 17th November 1803). "This so far varies the interlocutor of the Lord Ordinary as to consider the dock in the copartnership moveable property, because it was used in the business of the copartnership. This is different from the opinion of the Lord Ordinary, who considers the inventory as evidence of the property belonging to the copartnership; and the decision of the Court places the ground of decision as to its being moveable property, entirely in the use made of these in connection with the partnership business in trade.

"No case has ever gone so far as this, to say, that if a father and son are partners, and if the father allows to the partnership the use of the real estate, which belonged exclusively to him, that therefore he must be presumed to have given the half of such real estate to the son.

"The Court takes a distinction between the real estate used in the business of the partnership and that not so used. They decide as to what was used, but they leave to future consideration and decision the houses and shares in the Ropery Company, which were not used in the copartnership. This is a very inconvenient way of deciding. If the inventories were good evidence of the whole property being copartnership property, the Court should have decided as to the whole. If the use formed the sole ground of decision, the case, as decided, goes a great deal too far.

"The first ground of appeal is, that the respondent is not entitled to her legitim, because she accepted and homologated another provision. That point is not made out, and I shall move the affirmance of all the interlocutors as to this.

"The other point, however, as to the partnership, is of great consequence. As to all partnerships in England, I think the rule is, and the better rule of decision would be, to say, that the partners held the property as trustees for the creditors, and that the whole

1811.

KIRKPATRICK,
&c.
v.
SIMS.

1811. **KIRKPATRICK,**
 &c.
 *.
 SIMP. became personal estate. If the course of decisions in this country had run uniformly to that effect, I should have thought it right to say, that the same rule of law should prevail in Scotland. But if there have been cases in England ruled differently, I could not advise that the Courts in Scotland should adopt *that* which I consider the best principle of law in such a case.

"Till the case decided by Lord Thurlow,* we lawyers always considered the real estate belonging to a partnership as personal in point of succession; and we have always wished to get out of this case of Lord Thurlow.

"There may be great difficulties in Scotland in making up a title to real estate when used by a partnership. We must look into the cases to see if they rule this.

"If the case is to be decided on the inventories, I don't see why it should not apply also to the tenements and the shares in the Ropery Company. The printed cases have supposed that this will decide also as to them; but I think this is not so; unless you can predicate that these were used in the partnership, they will not fall under the rule. If the decision is *not* to go upon the *use*, then the other real property in the inventories will go along with the dock.

"But there is this difficulty here, that if the Court should hold the other property not to be held as moveable, the only *ratio decidendi* would be the *use* of the dock.

* The name of the case here referred to, was not given; but the Compiler of these reports suggests that his Lordship referred to the case of Thornton v. Dixon, 3 Bro. C. C. 199 Belt's ed. p. 84. In that case, Lord Thurlow had decided, that, after the dissolution of the partnership, by death or otherwise, "the heritable estate of a partnership could not be considered as personality, but would resume its original character and nature," and descend accordingly. Since that decision, and also one which followed it, (Bell v. Phyn, 7 Vesey, p. 452), many cases had been decided in a contrary way, holding that such estate was to be dealt with as personality in questions between heirs and executors. The decision of Lord Thurlow was thus considered to have been overruled by the later decisions; but later still, two decisions have been pronounced confirming the judgment of Lord Thurlow. These were cases pronounced in the Vice Chancellor's Court, Cookson v. Cookson, 12th July 1837; 8 Sim. Cases in C. p. 529; and Randall v. Randall, 27th Jan. 1835, 7 Sim. C. C. p. 271.

But Lord Eldon was always of opinion, that the estate of a partnership, whether heritable or moveable, in its own nature ought to be considered as personality to all intents and purposes. He decided this in Mackintosh v. Townshend, Montg. Partn. App. 96. He also repeated that opinion (*obiter*) in Selkirk v. Davies, 1814, 2 Dow, p. 231. Yet Mr. Collyer on Partnership, (1840), states, that "since the case of Cookson v. Cookson" "was decided, the question cannot be considered as settled by that decision; but that it must, on some future occasion, be determined before "a higher tribunal."

" We must therefore remit to the Court to review their judgment as to the dry dock, and to consider as to this along with the other property."

1811.

FLEMING

DRUMMOND.

It was therefore ordered and adjudged, That the several interlocutors complained of, so far as they find that the pursuer is still entitled to claim her legitim, be, and the same are hereby affirmed; and it is further ordered, that the cause be remitted back to the Court of Session to review the interlocutors complained of, as to all other matters, and particularly to determine, at one and the same time, upon the rights of parties with respect to the dock and pertinents, the tenement of houses, and the share in the Ropery Company, mentioned in the interlocutor, dated 17th, signed 22nd November 1803.

For the Appellants, *John Clerk, James Moncreiff.*

For the Respondent, *Sir Sam. Romilly, David Cathcart, Robert Bell.*

NOTE.—It is stated in the Faculty Collection, vol. xvii. p. 684, that after the remit back to the Court of Session, "the case was settled extrajudicially, in consequence of the defender having paid a considerable sum of money to the pursuer" (respondent).

THE HON. CHARLES FLEMING of Cumbernauld, *Appellant*;
GEORGE HARLEY DRUMMOND, Esq. one of
the Freeholders of the County of Kincardine, } *Respondent.*

House of Lords, 23d July 1811.

FREEHOLD QUALIFICATION—FICTITIOUS RIGHT TO VOTE.—In this case, objections were stated to the claim of a party claiming to be enrolled as a voter. The Court of Session sustained the objections, without taking or ordering any proof as to the fictitious nature of the claim. In the House of Lords, case remitted, with liberty to receive such evidence.

The appellant being seized and possessed, as a liferenter or tenant for life, of certain lands in the county of Kincardine, called the Kirklands of Kinneff, &c. held by him immediately of the Crown, and those lands being of an extent which by law entitles the holder to vote in the election of a

1811.

FLEMING
v.
DRUMMOND.

member of Parliament for the county, he presented his claim in terms of the statutes, to the freeholders assembled, at Michaelmas 1808, praying that his name might be inserted in the roll of freeholders, and he produced therewith his title-deeds, and the evidence of the valuation of the property.

To this claim the respondent, as one of the freeholders, objected, in the following words:—"The titles produced by the claimant afford only a bare liferent superiority to the lands specified in his claim. They are nominal and fictitious, and confidential, and therefore the claimant ought not to be enrolled;" to which objection it was answered, "That the qualification objected to is neither nominal nor fictitious, having been obtained by the claimant, purely for his own benefit and advantage. A liferent vote, honourably and fairly acquired, and without the claimant being under any confidential obligation whatever, such as the present, is unexceptionable, and by law cannot be called in question."

The Court of Freeholders having sustained the claim, and ordered the appellant to be enrolled, the respondent presented a petition and complaint to the Court of Session, as allowed by the statutes, praying the Court to find, that the freeholders of the county of *Kincardine* did wrong in enrolling the appellant, and to ordain his name to be expunged from the said roll. In the complaint, it was stated, that the complainer meant to support the objection he had urged at the meeting of the freeholders, (namely) that the appellant's pretended freehold is nominal, fictitious, and confidential, and such as the Court could not sustain; that the real nature and character of freehold qualifications, and whether they were substantial rights, or fictitious conveyances, for the purpose merely of serving political views, and advancing the interests of the granter, is to be gathered, not only from the appearance *ex facie* of the titles, but from every circumstance connected with the transaction. The titles in this case, it was said, evinced that it was not a real or substantial freehold; it was the conveyance merely of the liferent of a bare superiority, yielding no reddendo that could be taken into consideration. The Crown charter appeared to have been expedited for the purpose of creating this nominal qualification, and another of the same description, in the person of Mr. W. G. Adam, the appellant and that gentleman being both the nephews of Lord Keith, the

granter, by whom the charter was expedé, and the one of them, in like manner, the nephew, while the other is the son of the present representative of the county, who is brother-in-law of the right honourable granter of these rights.

1811.

FLEMING
v.
DRUMMOND.

The appellant having put in answers, denying that his freehold was nominal, and this being denied, he contended that it was incumbent on him to prove the fictitious nature of the right, while in fact he had not condescended upon any means of proof whatever. The Court of Session, after some further pleading, pronounced this interlocutor :—"The 2nd and 7th
" Lords sustain this complaint, and find that the freehold- Dec. 1809.
" ers of the county of Kincardine did wrong in enrolling the
" respondent in the roll of freeholders of said county, at
" the Michaelmas meeting held on the 4th October 1808 ;
" and therefore grant warrant to and ordain the sheriff-
" depute to expunge his name from the said roll : Find the
" respondent liable to the complainer in expenses ; appoint
" the account thereof to be given into Court, and remit to
" the auditor to tax the same, and to report."

On reclaiming petition, the Court adhered.

June 25, 1810.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The statute 1681 defines the qualifications of those entitled to be enrolled. By that statute it is enacted, that those *publicly infeft* in property, or superiority in lands, of the extent and valuation mentioned, shall have right to vote in the election of the commissioners of shires, and *likewise liferenters*, if the liferenters claim their vote. The law thus standing, it is not meant to be disputed that the statute gives the right of freehold to a party actually and *bona fide* the owner of such estate ; but, at same time, *possession*, in the literal sense, could not be understood, when the right was given to a superior, and not to the vassal ; and, from the beginning to the end of the statute, there is not a syllable defining the *quantum* of beneficial interest which the superior must have. It is sufficient that he stood in the relation of immediate tenant to the Crown in lands to a certain extent, though his vassal, or the actual possessor, drew the whole fruits. By the 7th Geo. II. c. 16, a certain oath, called the trust-oath, is prescribed for every claimant to take, when required so to do, otherwise his name is to be expunged. Imposing these oaths gave rise to questions, as if it had altered the law, while it evidently left the law precisely as it was, and only estab-

1811.

FLEMING
v.
DRUMMOND.

Ante vol. iii.
 p. 169.

lished one mode of discovering the truth, or whether the estate claimed upon really belonged to the claimant. With the quantum of the beneficial interest accruing to the claimant, or the legal interest being a liferent or a fee, or the claimant being a superior only, and not full proprietor, the oath, and the statute by which it was introduced, had nothing whatever to do. But the terms of it for a time, and till it was explained by numerous decisions of the Court of Session and of your Lordships' House, startled scrupulous persons. For a long time it was supposed that the oath was the only mode of discovering, whether the claimant's estate was held for his own benefit, or was nominal and fictitious, created to serve the purposes of another person; and this doctrine was certainly countenanced by several decisions of your Lordship. But, in the case of *Forbes v. Macpherson*, the Court of Session having refused to allow a claimant to be examined upon interrogatories, an appeal was taken, and your Lordships' judgment reversed the decree below, and ordered, "That the respondent do confess or deny the averments in appellant's pleadings." Since that time, it has been considered settled law, that the freeholders may insist on a claimant answering pertinent questions, and by every other competent mode of proof, according to the course of the Court of Session, may make out that the qualification is nominal. The appellant was willing to submit to examination, and to let the respondent into every other means of proof that could be suggested, but the respondent declined the offer, and rested his cause on what was said to appear on the face of the title, or was to be inferred from circumstances notorious and undenied.

Ante.

Pleaded for the Respondent.—The expiscation of questions of this kind is by two modes, 1. By means of the trust-oath; and, 2. By special interrogatories. An objector, or a body of freeholders, may resort to these or not just as he pleases, or they may submit the case to the judgment of the Court merely upon the proofs, as exhibited by the titles, the situation of the parties interested, and concomitant circumstances; or the qualification may be investigated by a proof at large. In the cases of *Elphinstone* and *Macpherson* no doubt was entertained upon this point. Here the appellant's title is the liferent of a superiority; and as in his pleadings in the Court below, he did not controvert the respondent's averment, that it was an estate perfectly unsubstantial, and yielding no return, this fact, *ex concessu* of the

party is fully established. The respondent averred it was a gratuitous conveyance; and this has never been denied. The crown charter, and the foundation of this and Mr. Adam's qualification, is a deed which pertains to Lord Keith, the granter; and though it is denied that this charter was obtained for the mere object of creating these two qualifications, it has certainly been made use of for that purpose. Nor can a favourable inference be drawn from the circumstance, that the date of the other titles in these gentlemen's favour do not precisely correspond. The disposition by Lord Keith to Captain Fleming is dated the 20th, and his sasine 29th June 1806, while the disposition to Mr. Adam is dated 30th August, and his sasine the 5th September. This seeming disconnection can have no effect. Besides, the situation and the circumstances of the parties, the granter and the grantee, furnish a most conclusive inference, amounting even to proof of the appellant's objection. The granter is a peer of the realm, a rank to which he has been exalted as the reward of his public services. The grantee, on the other hand, is a gallant officer in the British navy, the nephew of the noble granter, and in no way connected with the county, but having estates in Lanark and Dumbarton, with which alone he is politically connected. These circumstances are sufficient indications of the state of matters; and it is impossible to view the relative situation of these parties without at once perceiving that the appellant's right is a fictitious one.

1811.

FLEMING
v.
DRUMMOND.

After hearing counsel, it was

Ordered that the cause be remitted to the Court of Session to hear parties further thereupon, with liberty to receive such new allegations and evidence as the occasion may require, and with liberty for the complainer in the Court of Session, to call upon the defender to confess or deny such averments, as to the alleged nominality, as the complainer, by interrogatories or otherwise, according to the course of the Court, shall call on him to confess or deny. And it is ordered and adjudged, That the Court do review the interlocutor appealed from, and determine whether it is sufficiently established that the freeholders of the county of Kincardine did wrong in enrolling the respondent; and also to determine whether such facts shall be sufficiently established by what hath been already made to appear to the said Court, together with any such evidence or

1811.

MACDONALD
v.
ELDER.

proof as may be received, or made under such liberty as aforesaid. And it is further ordered, That the appellant be for the present restored to his place in the roll of freeholders aforesaid, but with liberty for the Court of Session to ordain the proper officer to expunge his name from the said roll, in any stage of their proceedings, under this remit, in which justice shall appear to the said Court to require the Court so to ordain.

For the Appellant, *Sir Samuel Romilly, Fra. Horner.*

For the Respondent, *Thos. Plummer, R. Hamilton, James Wedderburn.*

NOTE.—Unreported in the Court of Session.

LIEUT.-COLONEL ALEXANDER MACDONALD of Lyndale, sometime Major and Com- mandant of the Caledonian Volunteers,	} <i>Appellant ;</i>
CAPTAIN GEORGE ELDER, late of the Cam- bridgeshire Militia, now a Captain in the Royal Rifle Regiment, . . .	
	} <i>Respondent.</i>

(*Et c contra.*)

House of Lords, 24th July 1811.

CONTRACT—OBLIGATION—PROOF OF PAYMENTS—PAROLE—JUDICIAL DECLARATION.—(1.) Circumstances in which it was established by letters, &c., that the appellant had come under an obligation to procure the respondent a commission in the army; and having failed to do so, was liable in a sum equal to procure an ensign's commission at the time. (2.) Held that it was incompetent to prove payment of money by witnesses, or otherwise than *scripto vel juramento*, and, therefore, that the appellant was not entitled to call for a judicial declaration from the respondent (pursuer.)

This was an action raised by the respondent against the appellant, in the following circumstances, as set forth in the summons :—“ That an agreement was entered into betwixt
“ the pursuer and the said Alexander Macdonald, whereby,
“ on the one hand, the pursuer was to raise a certain number of men at a certain rate, for said corps, and, on the
“ other, the said Alexander Macdonald was to procure or
“ present to the pursuer, a commission as ensign in said

“ regiment, free of any expense. That after having recruit-
 “ ed for some time, and raised a number of men, but not
 “ the full complement for which a commission free of ex-
 “ pense was to be given, a new agreement was concluded
 “ betwixt the parties, by which, in consideration of the men
 “ so raised, and of the sum of £100 sterling agreed to be
 “ paid by the pursuer’s brother, for which he granted bills,
 “ payable at different periods, the said Alexander Macdon-
 “ ald became bound, with all convenient speed, to procure
 “ the pursuer gazetted as an ensign in the said regiment of
 “ Caledonian Volunteers; and, immediately following, a
 “ new bargain was entered into, as to the sum to be allow-
 “ ed to the pursuer for every recruit he should thereafter
 “ enlist, which was to be at the rate of £15. 15s. per man :
 “ That notwithstanding of these agreements, and that the
 “ pursuer enlisted a great number of recruits for said corps,
 “ after said second agreement as to his commission, the said
 “ Alexander Macdonald has not only failed either to procure
 “ the pursuer gazetted as an ensign of said regiment of
 “ Caledonian Volunteers, or in any other regiment of the
 “ line, but has also refused to settle accounts with him for
 “ the men he raised for said corps, at the last mentioned
 “ rate of £15. 15s. sterling, per man.” And the summons
 concluded, 1st, For payment of the sum of £400, as the
 price of an ensign’s commission. 2d, For £71. 9s. as the
 balance due on the recruiting account. 3. For the sum of
 £205. 6s. 8d., as the balance of his pay due as an ensign,
 from 1st August 1796, when he received his beating order,
 to 24th August 1799, when he received a commission in the
 Cambridgeshire Militia. 4. For the sum of £500 in the
 name of damages.

The appellant, on his part, raised an action for the sum of
 £472. 12s. 10d. as the amount of the sums advanced to him
 on the recruiting service, and for £270, being a sum ad-
 vanced to Messrs. Rocke and Co., army brokers, to procure
 the respondent a commission, who became bankrupt, with
 the amount of it in their hands. These actions were con-
 joined.

It appeared that the appellant had undertaken to procure
 a commission, and the sum stipulated by him, namely, £100,
 was given to him by bills, as well as the recruiting service,
 as the consideration for the commission. He failed in pro-
 curing the commission in the regiment agreed upon ; but in
 his letters promised to procure him one in another regiment.

1811.

 MACDONALD
 v.
 ELDER.

1811.

MACDONALD
v.
ELDER.

Steps were taken for this purpose, but the money was lost in the hands of the army brokers, who became bankrupt. Sometime thereafter the respondent obtained a commission through another channel, and without the aid of the appellant's interest. After production of correspondence and documents, the Lord Ordinary pronounced this interlocutor:

Jan. 20, 1802. —“ Having considered the mutual memorials for the parties, and whole process, with the letters of correspondence, and other writings produced, in respect of the indorsation by the defender, Lieut.-Colonel M'Donald, of the letter of service from His Majesty in his favour, addressed to Ensign George Elder of said corps, that is, the Caledonian Volunteers, commanded by the defender, of the receipt 10th March 1798, granted by the defender for two bills of £50 each, accepted by the pursuer's brother, declaring that these bills will be the balance due for your brother's ensigncy; finds that the defender, from the beginning, engaged to procure an ensigncy for the pursuer in said corps; and which obligation is put beyond doubt by the defender's letter of the 14th of August 1798, regretting his disappointment at not being able to procure said ensigncy, and adding, ‘ but, notwithstanding, I find myself bound to provide for you;’ in consequence, he states that he had wrote to Rocke and Co. to provide an ensigncy in some other corps, for which I shall pay: Finds that the defender is liable for the price at which an ensigncy might have been procured at that period, deducting the amount of the two bills by the pursuer's brother; as also for a sum equal to ensign's pay, from the 14th August 1798, the date of the above letter, to the 24th August 1799, when the pursuer obtained a commission in the Cambridgeshire Militia, and decerns: And in respect the defender did not consult the pursuer, when he proposed to lodge, or actually lodged, the money with Rocke and Co., for which they agreed to provide an ensigncy, and that the pursuer's letters, expressing his anxious wish to get the expected commission, are not sufficient to discharge the obligation incumbent upon and undertaken by the defender: Finds that he cannot throw the loss arising from their bankruptcy, or their fault in taking the money without providing the commission, upon the pursuer, assoilzies from the counter action at the defender's instance, in so far as it concludes for repayment of that money, and decerns; appoints both parties to give in special condescendences of their mutual

" claims, in so far as not decided by the interlocutor, and 1811.
 " that *quam primum*."

Both parties having represented, the Lord Ordinary or- MACDONALD
v.
ELDER.
 dered informations to be prepared, in order to report the
 case to the Court, and the case having been reported ac-
 cordingly, the Court pronounced this interlocutor: " Hav- Jan. 23, 1803.

" ing advised the mutual informations, with the letters of
 " correspondence, and other writings produced, find that
 " the defender, Colonel Alexander Macdonald, engaged to
 " procure an ensigncy for the pursuer, George Elder, in the
 " Caledonian Volunteers, particularly by the defender's let-
 " ter, of date the 14th day of August 1798; find that the
 " defender is liable to the pursuer for the price at which an
 " ensigncy might have been procured at that period, de-
 " ducting the amount of the two bills by the pursuer's bro-
 " ther; as also a sum equal to ensign's pay from the 14th
 " day of August 1798 to the 24th day of August 1799, and
 " decern: Find that the defender cannot throw the loss
 " arising from the bankruptcy of Rocke and Company upon
 " the pursuer; assoilzies from the counter action at the de-
 " fender's instance, in so far as it concludes for repetition of
 " that money, and decern: Find the defender liable in ex-
 " penses to the pursuer, George Elder; appoint an account
 " thereof to be given in to the Lord Ordinary, and remit to
 " his Lordship to hear parties further on their mutual claims,
 " so far as not decided by this interlocutor, and to do there-
 " in as he shall see cause."

On reclaiming petition by the appellant, the Court pro-
 nounced this interlocutor, adhering. The cause then went
 back to the Lord Ordinary, who pronounced this inter-
 locutor: " Having resumed consideration of this pro-Feb. 7, 1804.
 " cess, &c. finds the pursuer entitled, as the price of an
 " ensigncy, to £270, being the price to which Rocke and
 " Company reduced their demand, and which the defender
 " agreed to pay, but deducting £100, the contents of the
 " two bills of the pursuer's brother, with interest on the
 " balance from 24th August 1799, when, without any assist-
 " ance from the defender, the pursuer obtained an ensigncy
 " in the Cambridgeshire Militia. Secondly, To ensign's pay
 " from 24th March 1798 to said 24th August 1799, at the
 " rate of 4s. 8d. a day, besides 6s. a week for lodging, with
 " interest from the 24th August 1799. Thirdly, To £60
 " sterling, as the balance originally admitted by the defend-

1811. "er upon the recruiting account, with interest from the
 " 24th March 1799: Finds no other damage due to the
 MACDONALD " pursuer; repels the counter claims of the defender, and
 v. " decerna." On representation, the Lord Ordinary, by
 ELDER. special findings, adhered to the above interlocutor, and fur-
 ther found: "As to the counter claim set up, finds it in-
 " competent to prove payment of money by witnesses, or
 " otherwise than *scripto vel juramento*, and therefore that
 " the representer (appellant), is not entitled to call for a
 " judicial declaration from the pursuer; of consent, finds
 " that £1. 10s. falls to be deducted from the article £178.
 " 5s. 4d.; refuses the representation *quoad ultra*, and ad-
 " heres to the former interlocutor."
- Feb. 2, 1805. The appellant reclaimed to the Court of Session, but the
 Lords adhered, and remitted to the Lord Ordinary to mo-
 dify the account of expenses. He thereafter presented a
 June 14, 1805. bill of suspension against these interlocutors, which was
 refused.

Against these interlocutors the appellant brought the pre-
 sent appeal to the House of Lords; the respondent also
 bringing a cross appeal, in so far as the interlocutors did not
 find him entitled to all the sums concluded for in his sum-
 mons.

After hearing counsel, it was

Ordered and adjudged, That so much of the interlocutors
 complained of as finds the pursuer entitled to six shil-
 lings a week for lodging, with interest thereupon, and
 to £60 sterling, with interest thereupon, be reversed.
 And it is further ordered, that the interlocutors, in
 all other parts, be affirmed, and the cross appeal dis-
 missed.

For the Appellant, *Sir Samuel Romilly, M. Nolan.*

For the Respondent, *John Dickson, J. P. Grant.*

NOTE.—Unreported in the Court of Session.

LADY ESSEX KER, and LADY MARY KER, Sisters, Co-heiresses and next of Kin of John, late Duke of Roxburghe, deceased, and their Attorney,	} <i>Appellants ;</i>	1812. <hr/> KER, &c. v. WAUCHOPE, &c.
JOHN WAUCHOPE, Esq., the REV. CHARLES BAILLIE, and Others,	} <i>Respondents.</i>	

House of Lords, 17th Feb. 1812.

(Reduction on the ground of Incapacity).

REDUCTION—EXECUTION OF DEED—INCAPACITY. — Circumstances in which a deed, executed by the late Duke of Roxburghe, sought to be reduced on the head of incapacity, was sustained, and the reduction dismissed *quoad* the moveable succession. Affirmed in the House of Lords.

This was an action of reduction brought by the appellants to set aside certain deeds executed by the Duke, their brother, immediately before his death, on the ground of incapacity.

The circumstances were as follow :—The Duke, who was never married, possessed large estates in Scotland, held under entail, and also lands and heritable estate in that country held in fee simple, besides a dwelling-house in London, and a considerable personal estate. The whole, with the exception of the entailed estate, was subject to his absolute disposal.

In 1790 the Duke made a testamentary disposition, October 14th. whereby he gave, alienated, and disposed to himself, and the heirs whatsoever of his body, *whom failing, to the appellants equally between them, and the heirs whatsoever of their bodies* ; and failing either of them, and the heirs of her body, then her half to devolve to the other, and the heirs of her body ; whom failing, to the heirs of tailzie having right for the time to the earldom and estate of Roxburghe, the lands and heritages then belonging to him, or which should at the time of his decease belong to him, excepting his entailed estates. As also his whole personal and moveable estate, under the burden of paying all the just and lawful debts he might owe at the time of his decease. And he thereby nominated the appellants to be his executors, and reserved power to alter or revoke the said

1812. disposition, or otherwise burdening or disposing of the property at his pleasure.

KER, & C.
v.
WAUCHOPE,
& C.
Nov. 5, 1803. In November 1803 he executed a disposition of all his estates and effects of which he had the power of disposal, in favour of Messrs. John Wauchope and James Dundas of Edinburgh, Clerks to the Signet, in trust, for payment of his debts and of the legacies he should make, the residue to be conveyed or made over by the said trustees in favour of such person or persons, or applied for such purposes as he should direct by any writing to be thereafter signed or executed by him. And by a writing signed by the Duke at the same time with the trust-disposition, he declared, "That not having had it in his power to execute in legal form a deed of appointment or direction to his trustees named in the said trust-disposition, he desired they would understand, that in case by sudden death he should be prevented from executing such a deed of appointment as he had alluded to, that it was his *will and intention that the disposition* and settlement which he had formerly made in favour of his sisters (the appellants), should stand good as far as regarded them, burdened, however, with his funeral expenses, and his just and lawful debts, and the payment of such annuities as he had granted by bond or otherwise."

Mar. 19, 1804. Matters rested in this position until within a few hours of the Duke's death, which happened on 19th March 1804. A few hours before that event, the following disposition was signed and executed: "I, John Duke of Roxburgh, do hereby direct and appoint John Wauchope and James Dundas, Clerks to the Signet, the trustees named under a trust disposition and settlement, executed by me on 5th November 1803, to sell and dispose of my whole real estate in Scotland, and of my house and appurtenances in St. James' Square, London, at such prices as they shall think proper, and from the proceeds thereof, and of my personal estate, to make payment of the following legacies and annuities to the persons after named, (here a legacy to Mr. Dundas of £1000, and sundry other annuities and legacies), I farther appoint my trustees, after payment of the said annuities and legacies, and of any other legacies, and of my debts and funeral expenses, and expense of management, to invest the whole residue and remainder of my funds in the public funds, or upon real security in Scotland, the dividends and interest whereof they are

“to pay over yearly to Lady Essex and Lady Mary Ker,
“equally between them; and failing either of them, to the
“survivor, during their lives and that of the survivor; and
“upon the death of the survivor, I appoint the trustees to
“pay over the residue and remainder of my fortune to the
“persons, and in the proportions after mentioned, viz. to
“the Rev. Charles Baillie, second son of the late Mr. George
“Baillie of Mellerstone, one half of the said free revenue;
“to Sir John Scott of Ancrum, Bart., one-fourth thereof;
“and to Sir Henry Hay Macdougall of Mackerston, Bart.,
“the other fourth part thereof.”

1812.

KER, &c.
v.
WAUCHOPE,
&c.

This instrument was written by Mr. James Dundas, one of the trustees, and signed before these witnesses, Coutts Trotter, Esq. banker, John Battiste, the Duke's servant, and William Winter, apothecary. In the deed the date had been altered from 18th to the 19th March, but this arose from its not being observed that at the time the deed was executed it was past twelve o'clock at night of the 18th (Sunday) when it was executed.

A separate action of reduction was brought at same time by the appellants, to set aside the deed of 19th March 1804, in so far as related to the heritable property in Scotland, on the ground that at the time he executed this deed he was on deathbed. These two actions were separately argued, and separately decided. (Vide next appeal).

A proof was ordered to be taken on commission in London as to the Duke's capacity. Mr. John Clerk attended the proof for the legatees. Mr. Courtenay (now the Earl of Devon) was counsel for the appellants, and Mr. Robertson their solicitor. The medical gentlemen—the testamentary witnesses—and Mr. Dundas.

It came out in proof that Sir Lucas Pepys, who was the Duke's ordinary physician and intimate friend, had urged on the Duke to settle his affairs about twelve days before his death. He afterwards procured leave from the Duke to write for Mr. Dundas to come to London to settle these. This he did accordingly, and Mr. Dundas arrived on the 17th of March at Sir Lucas' house. He desired him to lose no time in seeing the Duke, *as he conceived that he was then hardly able to attend to business.* Sir Lucas, in giving his evidence, stated that he had two several consultations with Dr Reynolds and Mr. Dundas, that it was “agreed by the deponent, Dr. Reynolds, and Mr. Dundas, that his “Grace was not then in a state to transact any business.”

1812. The witness being asked to explain what he meant by the Duke's being in a state not fit to do business, depones, **KER, &c.** "That this does not apply to the debility of his body, but **v.** "to the stupid, comatose, and lethargic state of mind in **WAUCHOPE,** "which he was then generally lying." Dr. Reynolds de- **&c.** poned, "That the last time he saw the Duke was at ten o'clock on the evening of Sunday the 18th March. That for several days before the Duke died he was becoming rapidly worse, and both his body and mind were enfeebled: That upon his visit on Sunday evening he found the Duke hastening to dissolution; that he does not think the Duke knew him when he went in: That he rambled a great deal, and was very confused; that after the arrival of Mr. Dundas, he recollects it was the subject of conversation among Sir Lucas, Mr. Keate, Mr. Dundas, and the deponent, whether they thought the Duke in a capacity to make a will, and they all agreed he was not, to the best of the deponent's recollection." The other witnesses Keate and Winter thought the Duke "too far gone in imbecility of mind and body to make a will."

In regard to the consultation of the physicians, however, Mr. Dundas gave a different account. He said that he was sent for by them after they had seen the Duke, the night before the deed was executed. They stated to him that there must be no will, as the Duke was not then in a capacity to make one. Mr. Dundas answered most honourably and firmly that he would do nothing wrong; but that if the Duke gave him instructions, and he thought the Duke to be of sufficient capacity, he would make the will. After this the Duke did send for him, and gave instructions for the will, on which he acted. Mr. Dundas further deponed as to his first visit to the Duke on his arrival from Edinburgh, "that he remained with the Duke on this occasion about half an hour, and then went down stairs to dinner. Depones, that the Duke was perfectly distinct and collected during the above (half hour's) conversation, and as much so as ever the deponent saw him." "That at his first interview with the Duke, his Grace, after some general conversation, then said he was sorry he had brought the deponent to town; but he was under the necessity of doing it, as he had too long delayed to execute some deeds, that he said the deponent knew of. That the Duke said he was in a very bad state of health; but that if the deponent had time to stay a few days in town, he hoped he

“ would be better, and would then do what was necessary.
 “ That the deponent said to the Duke that he would attend
 “ his Grace, that he had other business in town which would
 “ detain him some time.” The next interview which Mr. Dundas had with the Duke was on the morning of Sunday the 18th March. He deponed, “ That he saw the Duke in bed betwixt nine and ten o’clock on Sunday morning : That the Duke then informed him that he had been very ill, and “ had had a very bad night, but was now getting better : “ That the Duke did not mention any thing about settlements to the deponent on that occasion, nor did he mention the subject to the Duke : That the deponent then “ went down stairs to breakfast, and the Duke sent for the “ deponent after breakfast, betwixt ten and eleven o’clock.” (A full account of this conversation is given, but the subject of the settlements was not talked of at it). Mr. Dundas afterwards deponed, “ That the deponent had seen the “ Duke several times in the interval between the physicians’ “ two visits : Depones, that nothing but general conversation took place on these occasions with the Duke, until “ about six o’clock in the evening, when he received a message by one of the servants, that the Duke wanted to see him. And having gone to the Duke, his Grace informed “ him that he now found it was not likely that he should “ get the better of his illness, and that therefore it was necessary to execute those deeds which he had so long intended, and that so soon as the visit of the physicians “ was over, he would send for the deponent, and give him “ his instructions.”

Accordingly, at the appointed time, Mr. Dundas was desired to attend the Duke. He deponed, “ That after the “ physicians had gone away (on the Sunday evening), the “ deponent was again desired to attend the Duke, and there “ being no table in the room, his Grace desired one of the “ servants to bring in a table, and materials for writing : “ That this was accordingly done, and the Duke proceeded “ to give the deponent his instructions ; and the Duke having given the deponent instructions with regard to several legacies, proceeded to dispose of the reversion of his “ fortune, by giving the liferent to his sisters, and a fourth “ part of the fee, upon their deaths, to Mr. Charles Baillie, “ a fourth to Sir Henry Hay Macdougall, and a fourth to “ Sir John Scott ; and he then desired the deponent to go “ and put these instructions into a regular shape, and that,

1812.

 KERR, &c.
 S.
 WAUCHOPE,
 &c.

1812.
 ———
 KERR, &c.
 v.
 WAUCHOPE,
 &c.

" by the time this was done, he would consider what he was
 " to do with the remaining fourth : That the deponent put
 " all these instructions down in writing, as the Duke gave
 " them, while he remained at his bedside."

When Mr. Dundas was engaged in preparing the deed, Mr. Coutts Trotter called on the Duke, to see how he was ; and Mr. Dundas took occasion to explain to him the circumstance of the Duke not having mentioned to whom he wished the other fourth part was to go. Mr. Trotter said, " Might you not suggest a certain gentleman whom he named, and whose name has been communicated to the parties, as a proper person to whom the fourth share might be left ; stating, as his reason, that this gentleman was a particular friend of the Duke, and was much with him in Scotland. That the deponent said, That it was rather a delicate thing to suggest any person to the Duke, but that he should do it. Depones, That soon afterwards the deponent went into the Duke's room, and informed his Grace that Mr. Trotter had called to inquire for him, and the deponent informed the Duke that he had asked Mr. Trotter to remain to witness the deed, and that he had agreed to do so. That the Duke said he was much obliged to Mr. Trotter. That soon after the deponent suggested the person named by Mr. Trotter as the person to whom the Duke, if he thought proper, might leave the undisposed of fourth ; but the Duke said, ' Certainly not ; that gentleman (naming him) is a very good man, but I have no intention of leaving him any part of my fortune.' Depones, That the Duke then said to the deponent, You know very well that I once had an intention of making a wider distribution of my fortune ; and he then added, situated as he then was, he considered it better to give Charles Baillie the remaining fourth, so that he would have one half. The Duke further said, That he had always a great regard for him, and always promised to do something for him ; that Mr. Baillie was now beginning to have a large family, and that it would be useful to him."

If there were any proof, stronger than another, for upholding the Duke's capacity, it was maintained that the reason given for this disposal of the remaining fourth to Mr. Baillie, was conclusive. Nay, it was further stated, and proved by the note of instructions, that the Duke gave a reason for all his legacies, which was not the act of a man wanting in capacity. For example, the one-fourth to Sir John Scott, was

accompanied with the explanation, "that he understood his estate was encumbered, and thought his legacy would do him good," and so with others. In the instructions, the legacy to Mr. Wauchope was first put down at £500; but when the deponent read over the instructions, the first time he came to Mr. Wauchope's legacy, the Duke said, "No; let Mr. Wauchope have £1000." "Depones, That while the Duke was giving the deponent these instructions the first time, he told the deponent where he would find a sealed parcel, and desired the deponent to bring it to him, which the deponent did. Depones, That the Duke explained to the deponent that his reasons for wishing to have the said parcel was, in order to see whether it contained a *bond of annuity in favour of a particular person in London, for whom he intended to provide.* Depones, That the sealed parcel contained, among other papers, a sealed letter, addressed to the deponent, in which was enclosed a bond of annuity in favour of the person named by the Duke."

The mode in which the Duke bequeathed tokens of regard to his particular friends, also tended to confirm the evidence as to his capacity. "To John Crawford, Esq. of Auchin-
aimes, my gold watch by Mudge, with my cypher engraved upon it, as a mark of my regard; and to Sir Lucas Pepys, Bart. *my best gold watch by Mudge.*" The minutiae of these bequests must have been totally unknown to Mr. Dundas.

When the deed was finished, it was carried to the Duke and read over to him. "The deponent read it over to him, but first asked his Grace if he would allow Mr. Trotter to come in; but the Duke declined this, saying, there was no occasion for it; and there was no person but the deponent in the room with the Duke when the deponent read over the deed to him. Depones, That after he had read over the deed, he asked the Duke if it was convenient for him to sign it then, and the Duke said that it was convenient, and desired that the witnesses might come in; whereupon Mr. Trotter, Mr. Winter the apothecary, and some of the servants came into the room. When Mr. Trotter came in the Duke asked him how he did, and said he was obliged to him for waiting so long to be a witness to that occasion, or words to that purpose; and the Duke asked how Mr. Coutts was." Mr. Coutts Trotter, in his evidence, stated that after the will was finished, Mr. Dundas carried it to the

1812.

 KERR, &c,
v.
WAUCHOPE,
&c.

1812.
 KER, &c.
 v.
 WAUCHOPE,
 &c.

Duke, and he heard Mr. Dundas *reading loud* for some time to the Duke. "The deponent then went into the Duke's room, and saw the Duke execute the will. Depones, That when he went into the room, the Duke was in bed at the further end of the room, and upon seeing the deponent advance, said, 'Trotter, how do you do? This is very kind of you,' and shook the deponent by the hand; to which the deponent made answer, expressing his regret to see him in that situation. Depones, That the Duke did not appear to him to be so very ill as he, the deponent, expected to find him. That the Duke spoke with a firm and strong voice. In signing the deed, depones, There was some difficulty, from the Duke having asked his spectacles, which could not be readily found, upon which his Grace expressed some disappointment. Depones, That at first the Duke attempted to subscribe the will when lying horizontally in bed; but finding that the attitude was inconvenient, by making the ink recede from the point of the pen, he was lifted up, and, in a sitting position, subscribed his name twice to the will, which was laid before him. Depones, That the Duke, in affixing his name at each time, asked if it would do; to which the deponent gave some encouraging answer. Depones, That deponent observed that one of the signatures by the Duke was mis-spelled; but that neither he nor Mr. Dundas represented that circumstance to the Duke; and after the Duke's subscribing the will, he was assisted into his former position, and wished the deponent a good night, with some friendly expression of hoping to see him again soon."

John Battiste depones, "That he was called in to witness the Duke's will; that the Duke was at this time in bed, lying upon his back. That he attempted to sign the will in that position, but could not do it as he lay, as the ink would not shade, upon which Mr. Winter and the deponent raised him up in his bed, and put pillows behind him, and then the Duke signed the will. Depones, That either Mr. Trotter or Mr. Dundas said to the Duke, 'You had better lie down, and not fatigue yourself, as you have got another paper to sign.' And the Duke did accordingly lie down, and he afterwards raised himself up without assistance, saying, I think I can do it now. Depones, That when the Duke began to sign the second time, he had not his spectacles on. That the deponent remarked

" that the Duke had not got his spectacles on, and Mr. Winter immediately whipt or put them on before the Duke knew any thing about it, without the Duke saying a word. " And *the Duke then observed*, that he believed he had left off at U."

1812.
KERR, &c.
v.
WAUCHOPE,
&c.

On the subject of the Duke's capacity, Mr. Dundas deponed, in answer to an interrogatory, " That the Duke was, to the best of the deponent's knowledge, as capable of making a will as ever he was in his lifetime; if the deponent had been of opinion that the Duke's faculties were impaired, or that he was incapable to make a will, he, the deponent, would not have presented a will to him to sign." Mr. Trotter deponed, " That the Duke was in possession of his faculties, and knew what he was doing. Interrogated, Whether, if the Duke had then made a draught on him of £500, he would have held himself safe to pay? Depones, That, in point of form, from the deponent's being present, the Duke could not make a draft upon him as a banker; but had he given the deponent any written direction for the disposal of money to that amount, he would not have refused it." John Battiste deponed, " That the Duke was in possession of his intellects, though weak in body." James Elliot and William Frazer, two of the Duke's servants, who attended him constantly to the last, concurred in opinion, that his mental faculties were entire; and Mr. Winter, the apothecary, deponed, " That the Duke, the night before he died, was quite collected, but was so weak in bed as to be scarce able to perform it, and was badly done at last." Mr. Winter added, " That he was at times confused, but that this may have arisen from the composing medicines prescribed for him by his physicians."

Mr. Dundas had been called as a defender, being one of the trustees appointed, but, on production of a renunciation of his office of trustee, and also of the legacy left to him of £1000, he had been assoilzied from both actions.

The cause, with the proof, was reported to the Court. The Court afterwards unanimously pronounced the following interlocutor:—" The Lords having advised the state of Dec. 21, 1805. " the process, writs produced, testimonies of the witnesses, " &c., Repel the reasons of reduction on the head of incapacity; sustain the defences in so far as regards the moveable or personal estate; assoilzie the defenders to that extent, and decern. But *quoad* the heritable estate in " Scotland, ordain both parties to prepare and give in me-

1812. " morials to the Court upon the question of deathbed." On
 reclaiming petition the Court adhered.
 KER, &c.
 v.
 WATCHOPPE, &c.
 Jan, 23, 1806,
 and Feb. 24,
 1807.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded by the Appellants.—Because it is established by the evidence that the Duke of Roxburghe was not of a sound disposing mind, or possessed of his faculties in a sufficient degree, when it is alleged that he gave instructions for, and executed the testamentary instrument in question.

Pleaded for the Respondents.—The whole circumstances which took place at the execution of the deed, together with the instructions given by the Duke in regard to the particular bequests, which were numerous, and the whole evidence, demonstrate that his Grace was of sound disposing mind. Also, that the instructions given to make the will were the spontaneous dictate of his own mind, and not brought about by importunity, solicitation, or suggestion from any person whatever; that these instructions were implicitly followed, and the instrument, when copied, read over to the Duke, in an audible voice, who expressed his entire approbation of it; and that it was afterwards regularly executed by the Duke, and acknowledged to, and attested by subscribing witnesses, of characters altogether unexceptionable.

After hearing counsel,

LORD CHANCELLOR (ELDON) said,—

" My Lords,—

" Perhaps I ought to apologize to your Lordships for what I did in the present case, a proceeding not usual with me. I stopped the respondents' counsel, in his commencement, to ask if they meant to press for costs. I did so, because I was impressed with a conviction, clear of all doubt, that the unanimous judgment of the Court of Session was right.

" I also approve of what the respondents' did, in declining to claim costs, because the expectation of the Ladies Ker may have been naturally enough raised in regard to the inheritance of their brother's estates, which might generate an anxiety with regard to his will, and the manner in which it was executed.

" The two circumstances which pressed most upon my mind were, 1. That the Duke's name was misspelt in his signature; and, 2d. That it appears the Duke had not made up his mind to whom he should leave the remaining fourth of his property.

" As to the first of these points, what weight is due, (and some weight is due to it), can only be determined by examining the rest of the evidence. God forbid that one of the most valuable

rights belonging to us, of disposing on deathbed of what we may have acquired in life, should be taken from us, because the palsied hand may then refuse to do its office. There are fair objections to the evidence of some of the servants on the score of interest ; but I see this matter of the Duke's subscription explained by one of the servants, joined to an affecting circumstance of his attachment to his master. He states that part of the subscription was done without spectacles, and that the Duke then called for his spectacles, and that Mr. Winter put them on.

" With regard to the other circumstances, it appears that when the Duke set about making a will, Mr. Dundas put questions, and got answers, and thus received the proper instructions.

" We are not to ask if there be more or less of delicacy in what occurred in suggesting the name of a friend of the Duke on this occasion. But to this suggestion, the Duke said no, ' he is a worthy man, but I never intended to leave him any part of my fortune. ' Let Mr. Charles Baillie have a half instead of a fourth.' It is impossible for us to allow ourselves to consider if there was delicacy in this suggestion or not.

" Mr. Dundas is a person totally unknown to me. All the judges in Scotland speak of him as a man of high honour and character ; and this was admitted by the appellant's counsel at the bar.

" Allow me to say that protection is due from your Lordships to a man of honour and character situated as Mr. Dundas was.

" He did not set himself forward to make this will ; but he was sent for from Scotland on purpose to come to town to make the will. This was done by Sir Lucas Pepys. Accordingly, he comes to town, and he finds that the opinion of the medical people is, that the Duke was not competent to make a will ; and Mr. Dundas was of the same opinion, and, according to the physicians, repeatedly (told so.)

" He was thus placed in a situation of great difficulty and delicacy. If he should find the Duke capable of making a will, and if he does thereupon act with firmness, he must foresee that his own character was at stake, and liable to be pulled to pieces by minute observations on all that should occur.

" What did Mr. Dundas do then ? There appears to have been a sort of expostulation between him and Sir Lucas Pepys, as to the propriety or impropriety of making a will. Mr. Dundas says, ' He need not be afraid, as he would do nothing improper ; but if the Duke gave correct instructions, he would execute them.'

" Then it appears from the evidence of him and Mr. Coutts Trotter, that the instructions were given at two different intervals, and the witnesses were Mr. Coutts Trotter, Mr. Winter, and one of the servants. These witnesses all give evidence to the Duke's capacity ; Mr. Coutts Trotter swears, That he would have paid money on the Duke's draft at that time.

" But it is said, we have the evidence of the physicians strongly on

1812.

KEB, &c.
v.
WAUCHOPE,
&c.

1812.
 ———
 KER, &c.
 v.
 WAUCHOPE,
 &c.

the other side. I can see no inconsistency in their evidence with that given by Mr. Dundas. As to Winter, I should have great difficulty in allowing him, in a court of law, to blow away the evidence arising from his attestation, as an instrumentary witness, of the Duke's sanity at the time.

"Dr. Reynolds says no more than this, that the Duke was in a comatose state when he saw him; but he says, in express words, that he thinks the Duke's sanity must depend upon the evidence of those who were present when the will was executed. Thus he does not undertake to say, that the Duke was not capable to make a will.

"As to Sir Lucas Pepys, he was of opinion that the Duke was not likely to be able to execute a will; he cautioned Mr. Winter and Mr. Dundas against the execution of any will; but the will, notwithstanding, was prepared by Mr. Dundas, and witnessed by Winter.

"Then we have Mr. Winter's letter to Sir Lucas on the morning after, mentioning that the Duke had executed a will; he notices the difficulty as to the signature, that it was badly done, but 'he hopes 'it will do.' We have also Mr. Winter's letter to Sir G. Douglas about a fortnight afterwards, in which he mentions that the Duke was 'quite collected.'

"Then we see that Sir Lucas accepts a legacy under that will. There is some evidence of his having thought of the Duke's *Delphin Classics*;* but I know Sir Lucas Pepys very well, and am satisfied

* The *Delphin Classics* here alluded to by Lord Eldon, as having been prized by Sir Lucas Pepys, were esteemed of great value; and, at the sale of the Duke's library, so much celebrated for its having contained the most select and valuable collection ever offered for public sale in England, they were keenly competed for, and bought by the Duke of Norfolk at the price of £500. They were the first edition of the work, bound in a magnificent style, as for the French king's library, and might well have formed the nucleus of a second Pepysian library. At the same sale, there was a book, which, if not of more transcendent worth, at least brought a much higher price. This was the celebrated unique copy of the *Decameron* of Boccaccio, which was knocked down to the Marquis of Blandford, eldest son of the Duke of Marlborough, at the large sum of £2260, the then Lord Althorpe being the bidder against him. It is said that Lord Althorpe, after having gone as far as prudence would dictate in the competition, stopped short, exclaiming to his brother near him, "What would our grandmother say to this?" The wholesome respect in which he held that lady operated fortunately in this instance; for the *Decameron* was sometime afterwards sold a second time, apparently under disadvantageous circumstances. At this sale it was bought by Messrs. Longman & Co. at nine hundred guineas, for Lord Spencer, and it now forms a part of the Althorpe Library, now one of the noblest in England. — *Vide* Dr. Dibdin's "*Ædis Althorpianæ*," with account of the Althorpe Library.

The first Duke of Roxburgh had bought the *Decameron* for £100.

that he would not have taken any legacy under a will which he considered to be bad.

"As we have here the clear evidence of the person who prepared the will, and of the three instrumentary witnesses, I am clearly of opinion that the judgment ought to be affirmed."

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *V. Gibbs, Wm. Adam, W. Courtenay.*

For the Respondents, *Sir Samuel Romilly, Henry Erskine, David Monypenny.*

1812.

WAUCHOPE,
&c.
KER, &c.

JOHN WAUCHOPE, W.S., only accepting }
Trustee of the deceased JOHN, DUKE of }
ROXBURGHE; the Rev. CHARLES BAILLIE, }
Second Son of the late Honourable }
GEORGE BAILLIE of Mellerstain, now } *Appellants;*
Archdeacon of Cleveland; SIR JOHN }
SCOTT of Ancrum, Bart.; SIR HENRY }
HAY MAKDOUGALL of Makerston, Bart.; }
and Others, }

LADY ESSEX KER, and LADY MARY KER, }
Daughters of ROBERT, DUKE OF ROX- }
BURGHE, deceased; and Sisters of the } *Respondents.*
late Duke, JOHN: and JAMES THOMSON, }
W.S., their Attorney, }

House of Lords, 21st Feb. 1812.

(Reduction on the head of Deathbed.)

DEATHBED—REDUCTION EX CAPITE LECTI.—A trust-deed was executed by John, Duke of Roxburghe, in *liege poustie*, conveying his heritable and moveable estate to trustees at his death, for these purposes; (1.) To pay his debts. (2.) To pay annuities and legacies; and, (3.) To settle the residue on such person or persons as he had or should afterwards appoint, by deed executed by him at any time during his life. He executed, on deathbed, this deed of instructions to his trustees, and this deed, in so far as it affected the heritable estate, was sought to be reduced. Held, that by the trust deed, the Duke had not divested himself of the heritable estate,—that the heir at law's right still existed until the moment of the Duke's death; and that the deed executed by the Duke on deathbed was reducible, in so far as his unentailed heritable estate

1812. was concerned, leaving it and the trust deed to have effect as to the moveable estate.

WAUCHOPE,
&c.
v.
KER, &c.

1803.

The present action is the reduction raised by the respondents, to set aside the deed of instructions and disposition of 19th March 1804, in so far as the Duke of Roxburghe's unentailed heritable estate was concerned, on the ground of deathbed. It was seen that a previous trust deed had conveyed his whole heritable and moveable estate to the appellants, as trustees for these purposes, 1. To pay his debts; 2. Legacies and annuities; and, 3. To convey and make over the residue to any person or persons he should appoint at any time during his life. This latter deed was accordingly executed, and called the deed of instructions on deathbed.

The facts, as to the execution of this deed, and the evidence led, are fully set forth in the preceding appeal; and it has been seen that the Duke died on the evening of the day on which the deed was executed. In this case, the Court had ordered memorials as to the question of deathbed.

When these were given in, the Court pronounced this interlocutor: "The Lords reduce, decern, and declare, in terms of the pursuers' libel, in so far as relates to the whole heritable subjects conveyed by the trust deed, dated the 5th day of November 1803, and descendable to the pursuers as heirs *alioqui successuræ* under the titles thereof, which stood in the person of John Duke of Roxburghe, exclusive of the *mortis causa* settlements executed by his Grace, and decern and declare accordingly. But in so far as regards the heritable property conveyed by the trust deed, and descendable to the Duke's heirs male by the titles thereof, remit to the Lord Ordinary to hear parties thereon."* On reclaiming petition the Court adhered.

July 8 and 9,
1806.

Nov. 25, 1806.

* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said,—“The challenge on this head (*Deathbed*) is clearly well founded as to the heritable estate.

“Heirs *alioqui successuræ* were not excluded by the trust-deed, (which was in *liege poustie*), but remained in their proper place till the Duke came to be on deathbed. It was too late then to execute a deed of any kind, to have the effect of displacing them, and introducing other heirs.

“The trust-deed, so far as it goes, neither is nor can be challenged, but the trustees must denude of the heritable estate in favour

After some farther procedure before the Lord Ordinary, is Lordship, of consent, disjoined the two actions which had been conjoined, and allowed them to be separately exacted, but refused to allow an interim decree, and appointed them to lodge their accounts in fourteen days.

1812.
WAUCHOPE,
&c.
v.
KER, &c.
Feb. 12, 1807.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1. The trust disposition executed by the Duke of Roxburgh in *liege poustie*, on 5th

of the heirs at law, after executing the other purposes of it, *i.e.* after paying debts and legacies, and accounting for the whole personal and moveable estate to the residuary legatees. The heirs at law, by relying upon them to denude the heritable estate, are not homologating the deathbed deed, but the reverse. The very ground of their objection is, that the last deed can have no effect as to the heritage. The effect of the trust-deed was not to change the state of the heritage, and instantly to convert into moveable estate. The deed remained in the grantor's power, and was to have no effect at all, even as a mandate to sell, till his death, and at that moment the succession to the moveable estate fell by law to the sisters, as heirs at law.

“ It is said that nothing remained with the Duke or his heirs, but a personal right of calling the trustees to account. But this is a mistaken view of that case. The estate itself remained, and was an heritable estate at his death, no matter whether in his own person or in a trustee for him. The right of the trustee was merely nominal. The truster, by means of his trustees, held even the feudal right, *i.e.* the substantial right. *Vide* case of Campbell in regard to selling. Suppose it could with propriety be called a *personal* estate, it was a personal right to lands, which is *heritable*. The word *personal* is too often confounded with *moveable*. The trustees cannot now exercise the power of selling, if the heirs at law choose rather to have the subject itself in kind. Cases of Durie, &c. In short, the ulterior destination has now fallen to the ground, and the mandate contained in the trust-deed has so far become ineffectual. The decided cases are all clear in favour of the pursuer, and the case of Ouchterlony no exception. The last deed having been executed *subito tempore*, the sole question was, Whether it would be rejected merely on account of its form, that is, because it was in the shape of a latter will, though truly a declaration of purposes. This was what Lord Braxfield alluded to in his observations, p. 35 of the memorial. The case of Kyde he thought different, the will there being a substantive not a relative deed. It is too critical to set aside a relative deed, merely on account of form. The Duke could not reserve to himself the power of dispensing with deathbed.

Speirs v. Sir Alexander Campbell, ante vol. iii. p. 201.
Willoch v. Ouchterlony, Dec. 14, 1769, Mor. 5539; House of Lords, ante vol. iii. p. 659.
Kyde v. Davidson, Mor. 5597, House of Lords, ante vol. iv. p. 63.

1812.
WAUCHOPE,
&c.
v.
KER, &c.

November 1803, reserves to his Grace, in express terms, the power of directing his trustees, by any deed executed even on deathbed, as to the disposal of the price or produce of his property invested in them. This trust disposition thus contains a reservation of power to the Duke to do that very thing which the respondents now challenge. This reservation is a condition of the trust disposition; and as the respondents connect themselves with the trust disposition, and make use of it as their title, they have no right to object to the exercise of these several powers which are contained in the deed, and on account of which it appears chiefly to have been framed. 2. The Duke of Roxburghe was effectually denuded of his whole unentailed heritable estate in Scotland, and the trustees were invested in that estate by means of the trust disposition of 5th Nov. 1803, which was executed when his Grace was in *liege pousitie*. It was this deed which divested his Grace of his heritage, and disappointed his heirs at law. But of this deed no reduction is brought, or can be attempted. The subsequent deed of instructions to his Grace's trustees, which alone is the subject of challenge in the present action, was not a conveyance of his heritable property, for of that he had been previously divested, but merely a destination of the price or produce of his lands, and was not therefore a deed of that nature which can be set aside *ex capite lecti*. 3. It is a circumstance which enters deeply into the consideration of this case, that the deed under reduction was not the effect of solicitation from any quarter; and that a settlement of this kind was long contemplated by his Grace after much deliberation, and was often spoken of by him to his agent as being, in the situation of his Grace's family, the most rational settlement that could be made. It was thus a deliberate act of the Duke's own mind, unprompted and unsolicited; and in so far as the respondents were deprived by it of the fee of the brother's estate, and restricted to the liferent of property worth at least £120,000, it was in consequence of the Duke's fixed resolution, framed for wise reasons, salutary to the respondents themselves, and which the Duke had determined upon for a course of years. The law of deathbed was not intended to strike against deeds of this description. In such a case, the tendency of the law is *ut voluntas testatoris sortiatur effectum*.

The appellants admit that the deed 19th March 1804 was executed on deathbed, and, consequently, that it was liable

to be set aside by his Grace's heirs at law, so far as any *real* interest in his heritable estates remained with the Duke at the time of his death; but they maintain that no such real estate remained in him at his death, because he had, by the trust, 5th November 1803, previously divested himself of all such. That by that deed the estates were vested in trustees in order to be sold, and, consequently, nothing remained in the Duke, or his representatives, but a right to call upon the trustees to account for the money received for the estates. Cases have been decided where the heir who accepts an estate, during the lifetime of the granter, with conditions that he should be at liberty to change it by any deed made even on deathbed, could not quarrel any such deed so made by the granter; this same rule must apply here. The deed of 5th November 1803 conveyed the heritable estate for trust purposes in *liege poustie*, and therefore the law of deathbed is out of the question.

Pleaded for the Respondents.—Because by the common and statute law of Scotland, the person who, in the character of heir, is entitled to succeed to the real property of any species, or the heritable estate of any kind, of a predecessor, or ancestor, as things stand sixty days before his death, may set aside every deed made in that interval, by which his succession is attempted to be defeated or encroached upon, or by which he suffers any prejudice, provided that the ancestor had, at the time of executing such deed, contracted the disease which terminated in his death. That this is an accurate definition of what is styled the law of *deathbed*, with the modification introduced by the statute 1696, cannot be controverted. The question then is, Whether the respondents, as the heirs general of the late Duke of Roxburghe, could be prejudiced by the operation of that instrument which he is said to have executed on the 19th of March 1804, when it is admitted that he was in a legal sense upon deathbed? Or whether they would reap a benefit by setting it aside? The appellants attempt to maintain the negative, and the respondents venture to assert, that a more desperate attempt has never been made. What the appellants say is, that the Duke had NO REAL estate or interest whereupon that instrument could operate, or which the respondents could take as his heirs, because he had divested himself and his heirs of the whole by the trust deed 5th November 1803, when he was in *liege poustie*, the state opposed to deathbed. All that remained in him after the

1812.

WAUCHOPE,
&c.
v.
KEE, &c.

1812.
WAUCHOPE,
&c.
v.
KER, &c.

November 1803, reserves to his Grace, in express terms, the power of directing his trustees, by any deed executed even on deathbed, as to the disposal of the price or produce of his property invested in them. This trust disposition thus contains a reservation of power to the Duke to do that very thing which the respondents now challenge. This reservation is a condition of the trust disposition; and as the respondents connect themselves with the trust disposition, and make use of it as their title, they have no right to object to the exercise of these several powers which are contained in the deed, and on account of which it appears chiefly to have been framed. 2. The Duke of Roxburghe was effectually denuded of his whole unentailed heritable estate in Scotland, and the trustees were invested in that estate by means of the trust disposition of 5th Nov. 1803, which was executed when his Grace was in *liege pousitie*. It was this deed which divested his Grace of his heritage, and disappointed his heirs at law. But of this deed no reduction is brought, or can be attempted. The subsequent deed of instructions to his Grace's trustees, which alone is the subject of challenge in the present action, was not a conveyance of his heritable property, for of that he had been previously divested, but merely a destination of the price or produce of his lands, and was not therefore a deed of that nature which can be set aside *ex capite lecti*. 3. It is a circumstance which enters deeply into the consideration of this case, that the deed under reduction was not the effect of solicitation from any quarter; and that a settlement of this kind was long contemplated by his Grace after much deliberation, and was often spoken of by him to his agent as being, in the situation of his Grace's family, the most rational settlement that could be made. It was thus a deliberate act of the Duke's own mind, unprompted and unsolicited; and in so far as the respondents were deprived by it of the fee of the brother's estate, and restricted to the liferent of property worth at least £120,000, it was in consequence of the Duke's fixed resolution, framed for wise reasons, salutary to the respondents themselves, and which the Duke had determined upon for a course of years. The law of deathbed was not intended to strike against deeds of this description. In such a case, the tendency of the law is *ut voluntas testatoris sortiatur effectum*.

The appellants admit that the deed 19th March 1804 was executed on deathbed, and, consequently, that it was liable

to be set aside by his Grace's heirs at law, so far as any real interest in his heritable estates remained with the Duke at the time of his death; but they maintain that no such real estate remained in him at his death, because he had, by the trust, 5th November 1803, previously divested himself of all such. That by that deed the estates were vested in trustees in order to be sold, and, consequently, nothing remained in the Duke, or his representatives, but a right to call upon the trustees to account for the money received for the estates. Cases have been decided where the heir who accepts an estate, during the lifetime of the granter, with conditions that he should be at liberty to change it by any deed made even on deathbed, could not quarrel any such deed so made by the granter; this same rule must apply here. The deed of 5th November 1803 conveyed the heritable estate for trust purposes in *liege poustie*, and therefore the law of deathbed is out of the question.

Pleaded for the Respondents.—Because by the common and statute law of Scotland, the person who, in the character of heir, is entitled to succeed to the real property of any species, or the heritable estate of any kind, of a predecessor, or ancestor, as things stand sixty days before his death, may set aside every deed made in that interval, by which his succession is attempted to be defeated or encroached upon, or by which he suffers any prejudice, provided that the ancestor had, at the time of executing such deed, contracted the disease which terminated in his death. That this is an accurate definition of what is styled the law of *deathbed*, with the modification introduced by the statute 1696, cannot be controverted. The question then is, Whether the respondents, as the heirs general of the late Duke of Roxburghe, could be prejudiced by the operation of that instrument which he is said to have executed on the 19th of March 1804, when it is admitted that he was in a legal sense upon deathbed? Or whether they would reap a benefit by setting it aside? The appellants attempt to maintain the negative, and the respondents venture to assert, that a more desperate attempt has never been made. What the appellants say is, that the Duke had no real estate or interest whereupon that instrument could operate, or which the respondents could take as his heirs, because he had divested himself and his heirs of the whole by the trust deed 5th November 1803, when he was in *liege poustie*, the state opposed to deathbed. All that remained in him after the

1812.

WAUCHOPE,
&c.
v.
KEB, &c.

1812.
———
WAUCHOPE,
&c.
v.
KEE, &c.

execution of that deed, according to the appellants, was a right to call on the trustees to account for and pay over the value received for the real estates, when sold, which right was moveable, and might be disposed of by will. But it is perfectly clear, in the first place, that the trust deed being testamentary and undelivered, could have no effect whatever till the Duke died; notwithstanding that deed he continued to be as much owner as ever he was, and, consequently, had in him, till the hour of his death, an estate descendable to his heirs, if he did not disappoint their succession, or so far as he did not disappoint it by that or some other deed executed in *liege poustie*. 2d. It is equally apparent that the appellants misrepresent the nature and terms of the trust deed. The estates were thereby to become vested at the Duke's death, and at that time only, if he executed no other deed, in the trustees, for the special purposes therein mentioned; and after they were answered, for the benefit of such person or persons, or for such uses and purposes, as he had directed or should direct, by any writing under his hand; and failing such directions, for behoof of *his next heirs*; and so far from there being any absolute direction to sell the estates, the deed limited the power of sale to such parts or parcels as the trustees might find necessary and expedient, for the purposes of the trust. If the trust deed had been followed by no other, it seems impossible to contend that the trustees could, in spite of those interested in the residue, have disposed of more of the real estates than were necessary to accomplish the special purposes, or of any part of those estates if the personal property was sufficient to answer those purposes. The residue must therefore have been held in trust for the Duke's heirs. And in face of all the decisions, and of common sense, it will hardly be maintained, that the law of deathbed does not attach on real estate, held through the medium of a trustee; and, above all, under a trust created by a testamentary revokable deed, not to take effect till the death of the grantor. Perhaps the simplest view which can be taken of this case, and surely the most favourable for the appellants, is by supposing the trust deed, as it stands, to have been *inter vivos*, and that the trustees had been actually and formally put into possession during the life of the Duke, and that they thereby became trustees for his creditors and donees, as well as for himself; Would not the Duke have then still had an heritable right and interest in the residue as to which

he had given no directions? Could the trustees have refused to reconvey to him, upon demand, all that was not necessary to satisfy the prior purposes? Could they, in spite of him, have insisted in converting the whole into money? Certainly not. Whatever right the Duke had under the trust, or after creating it, must have passed to his heirs, if he executed no other deed. If the whole real estates had been sold, no doubt the Duke's right would have been changed into a personal claim to the residue of the money, but not being sold *at his death*, his right was either to the whole heritable estate, or to the residue of the lands, and consequently vested in his heirs at law, but for the deathbed deed. And were it possible that the trustees could be permitted, after the Duke's death, in despite of his heirs, to sell the whole estates without necessity, it would not difference the present question, because the price must belong to those who had the beneficial interest in the estates at the time of the sale. It is, therefore, undeniable that the respondents, as heirs, are prejudiced by the *after deed*, which *restricts their right to a mere liferent*, and makes them also *liferenters of money*, instead of being *tenants in fee simple of land*; and if it was made upon deathbed, (which is admitted), they are entitled to set it aside, so far as they are prejudiced. If that deed had not been made, there was nothing to prevent the respondents taking up the succession as heirs at law. Under the deed 1790, they were entitled to take the estates in fee simple, or, neglecting that deed, had there been no other, they might have been served heirs in the property. The trust-deed of 5th Nov. 1803, qualified by the memorandum of the same date, was truly nothing, if the Duke did not execute a posterior appointment. The appellants feel themselves obliged to maintain that the trust-deed disinherited the heirs at law, and vested the estates in the persons therein named, for the purposes therein mentioned, and also for the purposes to *be mentioned* in any writing to be made afterwards, *even upon deathbed*: and the heirs being thus (as they contended) *completely cut off* by a deed made in *liege poustie*, it is nothing to them at what time, or under what circumstances, the posterior deed was executed. The appellants, however, do not maintain that a person can in any shape reserve a power to frustrate the succession of the heirs upon deathbed, and effectually execute that power in that situation, for that would be a palpable evasion of the law; but they say, that the purpose of the trust conveyance was to sell the real estates outright, and there-

1812.

WAUCHOPE,
&c.
v.
KEB, &c.

1812.
WAUCHOPE,
&c.
v.
KEE, &c.

fore it was not upon the estate, or the succession to it, that the after deed was to operate, but upon the money arising by the sale of the estate. Now the trust deed is to be considered in three views ; 1st, It was a trust for the Duke's creditors, and those to whom gifts by *liege poustie* deeds were conveyed, and so far it must stand good ; but it is of no consequence, because it was also a conveyance or will, as to personal estate, sufficient, probably, for the payment of all the debts, and which must be so applied before encroaching on the real estates ; and because, at any rate, the real estates were liable for the debts, if the personal estate proved insufficient ; 2d, It was a trust for raising money to pay any legacies the Duke might leave by any after deed or will ; but it is a settled point that a person on deathbed can no more affect the heir, or encroach on the real estate, by giving legacies or making gifts, than he can give away the estate itself : and vesting an estate in trust to satisfy legacies, when the reversion or remainder remains to the heir, is a mere device to elude the law of deathbed which cannot be supported. And, 3d, It was a trust as to the remainder for such persons as the Duke might afterwards appoint to take the benefit, which was precisely a trust for the grantor himself and his heirs at law, *if he did not make a different appointment in liege poustie* ; to carry the matter farther would at once annihilate the law of deathbed. The trust deed, as already observed, does not direct or authorize a total sale of the estate, and if it had, it would have been of no other consequence, if a sale did not take place before the Duke's death, than that the right of the respondents would have attached on the money ; for, subsequently, it was their estate which was sold : and hence it is evident that the right of the heirs at law was in no view cut off, but that there was an *heritable* estate, in which they continued interested, and might, *as heirs*, have claimed, but for the last or deathbed deed, which directs a total sale, and an investment of the money arising, for the benefit of *strangers*. Hence their right to set aside a deed by which they are clearly prejudiced. The appellants attempt to press into their service the decisions by which it is established, that if the heir has taken the estate in the life of the grantor, under conditions or reserved powers to the grantor, he cannot quarrel the exercise of those powers, though made on deathbed. There is no room for pretending that the respondents are in that predicament, and therefore this case does not apply.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors appealed from be, and the same are hereby affirmed.

1812.
CADELL
v.
BLACK, &c.

For the Appellants, *Sir Sam. Romilly, John Clerk, Adam Gillies, David Monypenny.*

For the Respondents, *Wm. Adam, Matthew Ross, Wm. Courtenay.*

[Mor. 13905.]

WM. CADELL, Esq. of Banton, . . . Appellant ;

WILLIAM, JOHN, JAMES, MARY, MARGARET, ALISON, AGNES, ANNE, JEAN, ELIZABETH, JANET, and CATHERINE BLACK, all Children of the deceased Henry Black, late tenant in Scotstown, parish of Abercorn, and shire of Linlithgow, and JOHN SOM- MERVILLE, Writer in Edinburgh, their Tutor <i>ad litem</i> ,	} Respondents.
--	----------------

House of Lords, 20th Feb. 1812.

DAMAGES—ASSYTHMENT—RELEVANCY.—The appellant had acquired right to an estate in which there was a pit not then in use, (and which had remained so, uncovered and unfenced, for many years previous to his purchase), situated at the side of a public road. A passenger on horseback having on a dark night deviated from the path, and fallen into the pit, the question was, Whether in law there lay any relevant claim of damages against the appellant, as owner of the land in which this pit was, and whether he was to blame in not fencing the pit. Held him liable in £800 of damages. Affirmed in the House of Lords.

This was an action of damages raised at the instance of the respondents, for the death of their father, Henry Black, farmer in Scotstown, occasioned by his falling into an unfenced pit, situated within the grounds of Grange, belonging in property to the appellant, while travelling home at night. The conclusions for damages were, 1st, For £2000 as reparation to them for the loss of their father. 2d. For £23 as the expense incurred in recovering the body ; 3d. For £20 as the value of the horse.

The father of the respondents was an industrious farmer, who married early in life, and had a very large family, whom his frugality and activity enabled him to support. He had his farm from Sir James Dalycell, at the rent of £120

1812.
—
CADELL
v.
BLACK, &c.

a-year. He was, besides, engaged in the corn and meal trade, which indeed formed his chief employment, and had, at his own expense, of more than £580, enlarged his farm, by taking lands in the neighbourhood for corn crops; and in this way often paid £200 a-year above the rent already mentioned.

At the close of the year 1800, Henry Black's family consisted of his wife, then in a delicate state of health, three sons and nine daughters. The eldest, a son, was about 28 years old, and the rest were of different ages down to infancy, the youngest being three years old. He was prospering in the world by dint of honest and incessant labour, and had hopes of rearing this large family to such a competence [for each as was suitable to his own station in life, when he was suddenly cut off in the manner following :

On the 5th of January 1801, Mr. Black had left home, upon business at the neighbouring town of Bo'ness. He did not return in the evening. Next morning early his son set out to Bo'ness to seek him, and found he had left that for Grange-Pans the day before. Upon going there he found that his father had left the house of James Young betwixt five and six o'clock the preceding evening, quite sober, and with the intention of going home, turning his horse's head into the usual road. The son proceeded homeward, making minute inquiries by the way. The public road from Grange Pans by which Mr. Black usually travelled, runs to a certain distance in a direction southward, and then separates into two roads, one of which continues right on to the south; the other branches off at right angles to the eastward. The latter was the road the deceased was to take home.

In the angle formed by the separation of this road into two roads, at this point, there is a very deep level coal pit, which had been used as an engine pit since the appellant became owner of the property; but the engine had been removed several years before, and the pit left uncovered and unfenced, though it was situated only *four feet* from the public road that runs eastward; and into this pit, containing fifty fathoms of water, the horse and his rider had stumbled from the darkness of the night. The son, on coming up to this point, observed the marks of a horse's foot, which he traced going towards the pit from the westward. He could find no tracks of the horse passing on, or going back from the place; and the appearance at the mouth of the pit

of a stone having been recently removed, as if it had fallen in, raised in his mind the dreadful suspicion that his father had in the dark plunged into the pit. After two or three days search the body of Mr. Black was found.

1812.

CADELL
v.
BLACK, &c.

This event so deeply affected his wife, that from the day of his death she never left the room, and died in three months afterwards.

The appellant offered to pay one hundred guineas, and the price of the horse, not in reparation but in charity, but this was refused; and the present action was brought.

The Lord Ordinary pronounced this interlocutor :—" Hav- Nov. 12, 1801.
" ing considered this condescendence, with the answers there-
" to, with the plan and copy of writings therein referred to, and
" having visited the ground where the pit is situated, in which
" the pursuer's father lost his life : Assoilzies the defender,
" Mr. John Cadell, in respect he had ceased to be proprio-
" tor of the ground before the accident happened ; as to the
" other defender, William Cadell, observes, that though
" there are some particulars, in point of fact, in which the
" parties differ, yet the most material circumstances on
" which the general issue of the cause will turn, are either
" agreed on, or cannot be seriously controverted ; so that
" the main dispute will turn on their relevancy to support
" the conclusions contended for by the pursuers. There-
" fore appoints memorials *hinc inde* upon the different points
" of law which may occur, particularly holding the road at
" the side of which the pit is situated to be so far public, as
" that the lieges in general are entitled to the use of it,
" (which seems obviously to be the case), whether the said
" defender, having acquired upon singular titles this pro-
" perty, with the pit in it, which had been dug many years
" before his purchase, and had not been rendered by him
" more dangerous than it was before, is, *de jure*, liable for
" any damage that may be thereby occasioned to pas-
" sengers subsequent to his purchase ; or whether is any
" thing more incumbent upon him than to enclose or fill it
" up when required so to do ; or to suffer the public, or
" those who have the charge of the public roads, so to secure
" it, as would be the case where there happens to be a scar
" or precipice at the side of a road, from which danger to
" passengers may be apprehended. Further, *esto*, the said
" defenders were found liable in reparation of any estimable
" damage which might be occasioned by the said pit, to

1812.

CADELL
v.
BLACK, &c.

“ the property or persons of the lieges, such as the loss of a
“ horse or cow, or where a person is only hurt, and claims
“ reimbursement of the expense of his cure, or of his loss of
“ wages while disabled from working ; whether is the loss
“ of a person’s life such a damage as can be legally estima-
“ ted, or as the children, or the representatives of the de-
“ ceased, can claim any sum of money in reparation to them ;
“ and whether the doctrine of assythment can apply to the
“ case, or to what extent or effect ; and what rule is to
“ be followed in the extenuation of it ? Appoints the me-
“ morials to be seen and interchanged, and afterwards
“ lodged in process.” The Lord Ordinary reported the
cause to the Court, and ordered informations, whereupon
Feb. 9, 1804. the Court pronounced this interlocutor :—“ The Lords find
“ the defender, *William Cadell*, liable in damages and ex-
“ penses, and appoint a condescendence of the damages, and
“ an account of expenses to be given into Court.”

Mar. 9, 1805.

The condescendence of damages was given in, and an
account of the expenses ; and answers, replies, and duplies
having followed, the Court then pronounced the following
interlocutor :—“ The Lords having advised this conde-
“ scendence, &c., modify the damages to be paid by the
“ defender, *William Cadell*, to £800 sterling, and the ex-
“ penses to £100, besides the full dues of extract. Find,
“ That in the distribution of the above sum of damages
“ among the children of Henry Black, each child who was, at
“ the date of his death, under fourteen years of age, shall be
“ entitled to a share double of that belonging to each child
“ who was then above that age ; and decern for payment of the
“ above sum at the term of Whitsunday next accordingly.”

July 2, 1805.

Both parties reclaimed, but the Court adhered.

Against these interlocutors the present appeal was
brought to the House of Lords.

Pleaded for the Appellant.—This is the first action of the
kind that appears in the records of the Court of Session,
and it derives no support either from the law of assythment,
from the Mosaic dispensation, from the Roman law, or from
actions on account of damages received by an individual in
his person, upon the principle of all which it was endea-
voured to support the present claim. In regard to assyth-
ment, both Stair and Erskine make this claim to attach
only where “ slaughter, mutilation, or other injuries to
“ the members or health of the body take place. Erskine

Stair, Book 1.
t. 9, § 7.
Ersk. B. 4, §
105, p. 797.

makes it to apply where the criminal or offender has escaped justice or been pardoned, yet that assythment for *slaughter* was due to the wife or executors of the deceased; and therefore it is maintained, that the only cases where assythment was due, was where a crime had been committed. In viewing this argument, it ought to be kept in mind, that the appellant was in no otherwise implicated in the death of their father than that he happened to have become the purchaser of land in which a pit was situated, wherein by accident he lost his life. And therefore the father of the respondents had not lost his life in a manner which entitled them to an assythment from the appellant.

1812.

CADELL

v.

BLACK, &c.

The Mosaic dispensation, upon which the respondents relied, had not been adopted into the jurisprudence of Scotland. But even though it had, the parts of the Mosaic code to which the respondents referred, did not warrant the conclusions that had been attempted to be drawn from them. "If a man shall open a pit, or if a man shall dig a pit and not cover it, and an ox or an ass fall therein, the owner of the pit shall make it good, and give money unto the owner of them, and the dead beast shall be his."* Exod. xxi. 33. But this ordinance does not relate to the case of a man falling into a pit and losing his life. Again, "When thou buildest a new house, then thou shalt make a battlement for the roof that thou bring not blood upon thine house, if any man fall from thence."—Deut. xxii. 8. But this was a mere regulation of police, and it is not even visited with any temporal consequences.

Nor has the present action any better support from the Roman law. The *Lex Aquilia*, the *Prætorian Edict De Suspensis vel positis*, and that *De Damno infecto*, all related to questions of damages occasioned by the wilful and criminal negligence of individuals in the uses made of their property, but do not apply to the case of an individual losing his life by an accident. In the edict, "*De his qui effuderint vel dejecerint*," it is no doubt provided, that if a free man perished in consequence of any thing thrown from a house on a public way, the owner should pay *quadraginta aurei*. But this regulation is not applicable to the present case;

* In the Session Papers below, it was argued, that if this was the rule of law as to the beast, it ought to hold equally good as to the man. Why give damages for the horse, and not for the man? Why make flesh of the one, and fish of the other? Both came under the general category of animal; and such accidents fell alike unto both.

1812. and Vinnius, in his Commentaries on the *Lex Aquilia*, says,
 CADELL " *Occiso homine libero non agitur ex lege Aquilia, quia*
 v. " *liberi corporis nulla est æstimatio.*" He indeed adds,
 BLACK, &c. " *qui injuste occidit,*" may be made liable in damages to the wife and family of the deceased ; but which is no more applicable to the present case than the law of assythment. And, lastly, the present action derives as little support from actions of damages, which are allowed for any injury suffered by an individual in his person through the act of another. The principle of these actions is, that as every individual is entitled to be protected in his person and property, so if he shall suffer in either without his own fault, in consequence of the wilful act of another, he is entitled to reparation. This is a right, however, which is enjoyed only by an individual himself, and such actions being allowed equally by the law of England as of Scotland, the mere circumstance that this is the first action which has been brought by the representatives of a deceased for damages sustained through his death, is of itself decisive that such an action derives no support from actions of damages.

But, in the circumstances of this case, even an action of damages could not be sustained. The pit in question was made in the lawful exercise, and for the necessary uses of the property. The appellant acquired the land upon which it was situated after it had been made, and he continued to use it for the purpose of working the coal in the land ; after he had ceased to use it, it continued surrounded by a wall, the lowest part of which, at the period of the accident in question, was at least eighteen inches in height. Its situation was known to all the neighbourhood. At the time the deceased lost his life he was a trespasser on the appellant's property, so that even if he had lost a limb only in place of his life, and brought action for damages, such action could not have been sustained.

Pleaded for the Respondents.—The father of the respondents was deprived of his life in consequence of the culpable negligence of the appellant ; and, according to the law of Scotland, they are entitled to damages, in reparation of the severe loss and injury they have suffered by their father's untimely death. The appellant pretended, in the Court below, that he had been unable to discover, in any of the books, an authority in support of such an action of damages. Lord Stair, however, in his chapter on Reparation and Damages arising from delinquency, puts this very case, and

states the law plainly. "The life of any person being taken away, the damage of those who were entertained and maintained by his life, as his wife and children, may be repaired."—Inst. B. I. ix. § 4. The reparation so given by the law to the widow and children of one who loses his life, is founded upon exactly the same principle with the reparation given to the person himself who suffers a maim in consequence of such negligence.

1812.
RANKEN
v.
CAMPBELL.

It is said that assythment is only due where the fact of slaughter is brought home to the defender directly, not where the death is a consequence only of his negligence. The respondents have no occasion to inquire, whether this doctrine be correct respecting a proper process of assythment; because their action is not what is technically called an assythment, but is an action for reparation and damages for the injury they have suffered *quasi ex delicto* of the appellant.

After hearing counsel,

It was ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be, and the same are hereby affirmed, with £200 costs.

For Appellant, *M. Nolan, W. G. Adam.*

For Respondents, *J. P. Grant, Fra. Horner.*

(Mor. App. "Deathbed," No. 5.)

GEORGE RANKEN of Whitehill, . . . *Appellant;*

HUGH GOODLET CAMPBELL, Esq., . . . *Respondent.*

House of Lords, 24th February 1812.

DEATHBED—REDUCTION EX CAPITE LECTI.—A feu-disposition was sought to be reduced on the head of deathbed, to which it was answered, that the heir at law was excluded by a previous deed executed in *liege poustie*—namely, a minute of sale which sold to him these lands, and that the subsequent deed was only in implement of that transaction. Held, that as the subsequent deed was in its nature a new transaction, the previous sale must have been departed from and abandoned by both parties, and held by them as an incomplete transaction; and, therefore, the law of deathbed applied.

This was an action of reduction brought by the respond-

1812.
 HANKEN
 v.
 CAMPBELL.

ent, as heir at law of Hugh Logan of Logan, Ayrshire,* against the appellant to set aside a feu-disposition of the lands of Burnhead and Hylar, executed by his uncle, on the following grounds:—1. That it was executed upon death-bed, the deed having been executed on 23d January 1802, and Mr. Logan having died upon the 12th March 1802, within forty-eight days of its date; and, 2. On the ground of incapacity.

This feu-disposition, which stipulated a price of £2000, with an annual feu-duty of £10 per annum, had been preceded by a minute of sale, signed by the parties some six months before Mr. Logan's death, stipulating the sum of £2000 as the sole purchase price; and action was brought by the appellant to compel Mr. Campbell to implement that minute of sale. These two actions were conjoined; and, afterwards, in consequence of a suggestion by the Court, a second reduction was brought also by the respondent of the minute of sale. The minute, while it sold the lands in question, contained a clause entitling the seller to borrow £1500 on the lands on bond, and the other £500 was to be paid to his heirs, and executors or assignees, at the first term of Martinmas after his death. The ground of reduction was, that the minute of sale was in law to be presumed to have been abandoned by the parties for the feu-disposition subsequently executed; and having been so abandoned for a new deed, totally different in its nature, it could no longer be founded on. In short, that the minute of sale was an incomplete and unconcluded transaction, which, before it had been carried into legal effect, was broken off and departed from. A condescendence was ordered of the facts. From these, it appeared that the deceased Mr. Logan had been very improvident in the management of his estate. Endowed with a vein of wit and humour, and his society universally courted, these qualities engendered expensive and improvident habits. The consequence was, that he had got into debt, and the appellant, it appeared, in many instances, had assisted him to get out of his difficulties, had helped him in pecuniary transactions, and had, finally, been of great service in the management of his affairs. Mr. Logan at one time had resolved to sell part of his property, namely, that part now in question, but had declined

* "The Laird of Logan, or Wit of the West," is supposed to celebrate this personage.

to take less than £3000 for it. It not being sold, part was let on lease to the appellant at a yearly rent of £110; the other part, inclusive of coal, yielded a rent of £40. In all £150 per annum. Sometime thereafter, and under an avowed desire to reward the appellant for his services, he came to the resolution of selling it to the appellant for £2000, stating, that he meant the difference as a compensation for Mr. Rankine's trouble in his affairs. When his Edinburgh agent was asked to prepare the disposition, he declined, stating that the title-deeds of Logan's lands of Burnhead and Hylar prohibited "him from gratuitously disposing of these lands, or altering the order of succession. Logan may, no doubt, sell these lands to an onerous purchaser for a fair price. I am totally ignorant of the value of the lands; and I mentioned to Mr. Logan, as well as to Mr. Ranken, that they should avoid any transaction, which, under the colour of a sale, might afterwards be considered as a collusive bargain, to counteract the prohibition in the titles. I rather imagine, that a feued right (where the feu-duty is so small) can be considered in no other light than a sale. *It is a pity Logan would not fall upon some other less hazardous mode of rewarding Mr. Ranken's services.* This is my opinion of the matter, and I mentioned it formerly both to Logan and Mr. Ranken." This letter was addressed to Mr Gavin Hamilton, Mr. Logan's agent in the country, who had drawn out the minute of sale. In consequence of the doubts expressed by Mr. Mackenzie, it appeared from the correspondence that the parties changed the form of the transaction as intended by the minute of sale. In a letter written by Mr. Logan to Mr. Mackenzie, he says,—"*I was quite certain it was wrong to mention any price, so must have all done over again, and will write you on that account.*" These facts were proved by correspondence; but a proof was allowed generally. The proof on the subject of incapacity failed, it being proved that he was sensible and in possession of all his faculties at the time he executed the deed, but having at intervals lethargic fits which did not last any time. The Lord Ordinary reported the case to the Court.

Upon considering the pleadings, and hearing counsel, the Court seemed all agreed that the respondent's plea, founded on the state of the titles, was ill grounded, in respect that the old destination was cut off by prescription, Mr. Logan having possessed the estate upon titles altogether independ-

1812.

RANKEN
v.
CAMPBELL.

1812. ent of that destination; and therefore the question was disposed of on the validity of the feu-disposition and the minute of sale.

RANKEN

vs.

CAMPBELL.

Nov. 15, 1805. — The Court, by a majority, pronounced this interlocutor :
 “ the parties, with the proof adduced, and writings produced, and advised the whole, allow the supplementary summons of reduction of the minute of sale to be repeated, and conjoined with the mutual actions of reduction and implement betwixt the parties already conjoined; and conjoin the whole of these actions accordingly; sustain the reasons of reduction of the said minute of sale, and also of the disposition, both produced and founded on by the defender, George Ranken, and reduce, decern, and declare accordingly; sustain the defences for Hugh Goodlet Campbell in the action of implement; assoilzie him from the conclusions of that libel, and decern; and remit to the Lord Ordinary to hear parties further on the other conclusions of the libel at the instance of the said Hugh Goodlet Campbell, and to do therein as he shall think just.”

Dec. 6, 1805. On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—Assuming, upon the opinions delivered by the judges of the Court of Session, that the late Hugh Logan had the power to dispose of his lands at pleasure, and that the respondent, his heir at law, is bound to fulfil the obligation Mr. Logan came under by the contract or minute of sale with the appellant, if it be a subsisting deed; and assuming that Mr. Logan was in possession of all his faculties, and that his intention was to reward the appellant for his valuable services, while no vestige of fraud appears, the only question then for consideration is, Whether the contract or minute of sale was abandoned or given up by the parties? And if it was *not*, Whether it be still an efficient instrument, affording action to the appellant, did it stand alone? Either the respondent is barred from challenging the disposition on the head of deathbed, by want of interest, seeing that deed was not to the prejudice of the heir at law, but more favourable to him than the contract which was executed in *liege poustie*; or if he chooses not to concede this, but to insist on his privilege, then he is bound to fulfil the contract *in terminis*, and the decree reducing it

is erroneous. But the respondent, in order to get out of this dilemma, maintains that the contract or minute of sale never was complete or binding, or if binding, was passed from by the parties, and a new transaction or bargain entered into, which latter transaction is reducible on the law of deathbed. But there is no ground for maintaining that the minute of sale was not a complete and binding transaction. The clause in the minute of sale, declaring that it was to be placed in the hands of Mr. Logan's agent, (Mr. Mackenzie), and that he was not to part with it, but upon the joint order of the parties, does not prove this but the contrary. Again, if the minute of sale was abandoned, why was it not destroyed? The fact is, that every thing concurs to show that there was no such intention to abandon it. Mr. Logan, as the letters prove, was most anxious, from first to last, that the lands should be conveyed in the way set forth in the minute; and it was only when Mr. Mackenzie threw out doubts as to the validity of a sale in that form, that the feu disposition was resorted to, in order to make Mr. Ranken's right to the estate more secure. And it is therefore impossible to suppose it ever entered into Mr. Logan's mind to do away with the minute of sale he had voluntarily executed. The disposition was evidently meant to corroborate and fulfil it on his part, so far as he imagined he had power to do. No doubt much stress was laid on an expression in one of Mr. Logan's letters, after learning Mr. Mackenzie's scruples, he says, "It *must be all done over again*," but from the context of that very letter, as well as from the tenor of Mr. Logan's other letter in evidence, it is clear that he only meant an alteration in form and not in substance. The minute of sale therefore ought to be held as a valid subsisting deed, sufficient to protect the disposition from the objection of deathbed.

Pleaded for the Respondent.—The feu-disposition granted by the late Mr. Logan of Logan, in favour of the appellant, on the 23d of January 1802, is reducible *ex capite lecti*, this deed having been subscribed by the late Mr. Logan within less than sixty days of his death, and after he had contracted the disease of which he died. The only answer attempted to be made to this plea is, that the respondent is alleged to have been excluded from the succession, by the previous minute of sale of the lands, executed on the 16th September 1801, when Mr. Logan was in *liege*

1812.

 RANKEN
 v.
 CAMPBELL.

1812.
 HANKEN
 v.
 CAMPBELL.

poustie; and hence it is contended, on the authority of a variety of decisions, that the respondent has neither title nor interest to set aside the feu-disposition. But to this it is replied, that the minute of sale was an unfinished bargain, which the parties had abandoned and given up; so that the respondent's title and interest to set aside the feu-disposition are unquestionable; and the authorities referred to are inapplicable to the present case. 2. The feu-disposition being set aside *ex capite lecti*, the appellant has it not in his power to recur to and found upon the minute of sale of 16th September 1801, as his title to the lands. This minute of sale was merely the commencement of an intended bargain, which was broken off by the parties themselves, and entirely put an end to, from a belief that the proposed bargain could not be carried into effect, and that it was necessary to enter into a totally new and altogether different and independent contract. 3. The lands conveyed to the appellant were, besides, held by Mr. Logan under an entail, which restrained him from making any such conveyance thereof to the prejudice of the heirs of entail. This entail, which had been executed by Mr. Logan's father, Hugh Logan the elder, in the year 1739, and upon which his brother George was infeft in 1745, was not indeed an entail of the strictest kind, but it was an entail that effectually limited the heirs succeeding, from doing any gratuitous deed to the prejudice of the subsequent heirs; and the conveyance here was clearly a gratuitous act, because it gave away the estate for little more than one-fourth of its value. 4. Besides, the transaction, in so far as the value was concerned, and the incapacity of Mr. Logan, was a most unequal bargain, and ought therefore not to stand.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *David Boyle, D. Cathcart.*

For the Respondent, *Wm. Adam, Matthew Ross, David Monypenny.*

The LADY ESSEX KER,		<i>Appellant ;</i>	1812.
SIR JAMES NORCLIFFE INNES, Bart., BRIGADIER-GENERAL WALTER KER, and JOHN BELLENDEN KER,	}	<i>Respondents.</i>	LADY E. KER v. INNES, &c.

House of Lords, 26th Feb. 1812.

ENTAIL—DESTINATION—ELDEST DAUGHTER—HEIR FEMALE.—An entail, after calling certain substitutes, called, failing them, “ the eldest dochter of the said Hary Lord Ker, without division, and “ yr aires male.” Lord Hary Ker had four daughters, and it was held, both in the Court of Session and House of Lords, that this destination was not to be confined to the eldest born daughter, but applicable to the whole four, whichever of them might be eldest at the time the succession opened. Lady Essex Ker, who was a female descendant of the body of Lady Jane Ker and Sir William Drummond, did not dispute this ; but she stated that the term *eldest daughter* was capable of a more extended meaning, and to mean, in the technical language then in use, an “ heir female” however remote, under which category she was entitled to succeed, as the eldest heir female of Hary Lord Ker for the time being. The Court held her claim inadmissible. Affirmed in the House of Lords.

This case respects the claim of Lady Essex Ker to the entailed estates and honours of the Duke of Roxburghe.

She did not join issue with the respondents—the three other competitors for these estates ; and it was only after the case in that competition was finally disposed of in the Court of Session in favour of Sir James Norcliffe Innes, that she and her sister, Lady Mary Ker, raised the present declarator.

The situation and circumstances of the Roxburghe estates and honours are fully detailed in the previous cases, ante vol. v. p. 320.

There it was seen that the Earl of Roxburghe obtained a charter from the crown, and executed an entail, or deed of nomination of heirs in the form of a strict entail, in 1648.

The first branch of destination in this deed called a series of heirs *nominatim* ; the second branch of destination was in the following terms, and upon which the present question, as well as the question in the other cases, arose : “ And whilks all failzeing, be decease, or be not observing “ of the previous restrictions and conditions above written, “ the right of the said estate shall pertain and belong to the

1812. " *eldest dochter of the said Hary Lord Ker, without division*
 " and yr airis male; she always marrying or being married
 LADY E. KER " to an gentleman of honourable and lawful descent, wha
 v. " sall perform the conditions above and under written;
 INNES, &c. " whilks all failing, and their said airis male, to our nearest
 " and lawful airis male whatsoever."

It has been seen how all the male line of descent, as embraced in the first branch of the destination, had failed, ending with William Duke of Roxburghe, who died in 1805. The first branch of the destination in the entail 1648 being thus exhausted, the second branch above quoted came into operation, which gave occasion to the several competitions which arose—each party giving a different interpretation to the meaning of the above clause.

It has also been seen upon what grounds the several competing parties claimed to succeed, ante p. 333.

In particular, it was contended that, by several deeds, forming a part of the investitures to the estates anterior to the year 1747, the words "*their heirs male*" had been changed by dropping the word "*their*," and substituting "*her heirs male*" in their place; and prescription having run on the title so made up, the clause was to be construed as confined to the eldest born daughter; to which it was answered, that as the last of the above mentioned deeds (1747) specially referred to the destination in the deed 1648, and adopted it, these investitures must be read as in favour of "*their heirs male*." But this point was not much pressed in this case.

The appellant, in her summons, represented her and her sister, (who afterwards withdrew from the action), "as the immediate descendants and nearest lawful heirs of the marriage between Sir William Drummond and Lady Jean Ker; and also the immediate descendants and lawful heirs of Hary Lord Ker, and Robert, first Earl of Roxburghe." And she maintained that the clause was capable of a much more enlarged interpretation than that given to it by Sir James Norcliffe Innes. Though the word daughter, in vulgar language, might mean a female descendant in the first degree; yet, in a more enlarged legal sense, it denoted any female descendant, however remote. And, in technical language, such as was used at the date of the entail 1648, it had acquired a new and separate meaning, equivalent to, and the same with "*heir female*;" or, in other words, heir of line, or heir whatsoever, after the failure of the male

line of descent; and she founded on the Kinfauns case to support this view. The appellant's construction, therefore, gave the clause a more enlarged interpretation of that given by Sir James Norcliffe Innes, so as to include her. 1st, She maintained that the *individual* meaning of the words "Eldest daughter," in the destination 1648, was excluded by the arguments already stated by Sir James Norcliffe Innes, and the judgment of the Court below. That these arguments and decisions showed that the words must be taken, not as individual but as collective or generic, designating a plurality of persons succeeding to the destination one after the other. 2d, That, accordingly, the meaning contended for by the appellant was a generic meaning of that sort, well known in Scotch deeds of destination of the same kind and similar date with the deed 1648, and likewise in the Roman and feudal laws, from which the language of Scotch conveyancing was derived. That, upon the other hand, the meaning put upon these words by Sir James Norcliffe Innes was wholly unexampled, no Scotch lawyer or conveyancer having ever used the words in such a sense; and particularly Earl Robert himself and his conveyancer, or at least the latter, when he, in the deed 1644, wished to express a meaning similar to that contended for by Sir James, having used a form of words wholly dissimilar. 3d, That the intention of the entailor to use the words in this broader sense, was indicated by a variety of circumstances, in the situation of the entailor, and in the form of expression of the particular clause in question, and of other parts of the deed 1648. That the destination was not to "eldest daughter," but "eldest daughters."

In answer, Sir James Norcliffe Innes. 1. That the pursuers (appellants) were not called to the succession of the entailed estates of Roxburghe by the terms of the destination in the entails thereof: and the respondent, Sir James Norcliffe Innes, has now succeeded to these estates; and his right has been established by the judgments of the Court of Session. 2. The appellant was only heir of line of her brother, and as such could not claim under the destination of the entail 1648. 3. Besides, the word "daughter," in its proper and primary, and ordinary meaning, whether in the daily intercourse of life, or in formal deeds, means an *immediate female descendant*. It has not, and cannot be shown, that in *tailzied* succession this word has been used or understood in a different sense. And where it is intended to call

1812.

LADY E. KERR
v.
INNES, &c.
Lyon & Blair.

1812. in all the descendants in the female line, and especially where the first heirs called are heirs male of a certain description, the term "heir female" has long been in general use. But where, after calling a daughter, or several daughters of an individual, there is a substitution in favour of heirs male of the bodies, the limitation to the immediate offspring becomes if possible more clear and determinate. And still more where, after a substitution in favour of heirs male of the body, there is another to heirs male general, the exclusion of heirs female, properly so called, must thus be put beyond all doubt. Besides, in the entail of Roxburghe, the ordinary legal signification of the term "daughter" was confirmed by the general tenor and purpose of that settlement.

LADY E. KER
v.
INNES, &c.

June 22, 1810. Lord Armadale reported the case, on Informations, to the Court. The Court pronounced this interlocutor:—"The Lords, upon the report of Lord Armadale, having advised the mutual informations for the pursuer and Sir James Innes Ker, Bart., and whole process, &c., find that the pursuer, Lady Essex Ker, has not made out her claims to the entailed estate of Roxburghe, therefore sustain the defences; assoilzie the whole defenders from the conclusions of the libel, and decern; superseding extract until the first box day."*

Nov. 13, 1810. On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

The same argument was pleaded in the House of Lords as has been already set forth:

Whereupon it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *John Clerk, J. H. Mackenzie, Alex. Maconochie, Henry Brougham.*

For the Respondents, *Sir Samuel Romilly, Ro. Craigie, W. Horne.*

* Opinions of the Judges:—

All the judges remained of the same opinion, as delivered by them in the former case with General Ker. President Blair had since

then been raised to the Bench ; and he alone delivered an opinion as follows :—

1812.

LORD PRESIDENT BLAIR said,

LADY E. KER
v.
INNES, &c.

“ My Lords,—

“ The pursuer insists to have it declared that she is entitled to succeed to the estate of *Roxburghe*, as heir of tailzie and provision to the last Duke, by virtue of a *deed of nomination*, executed by Robert, Earl of Roxburghe, in 1648.

“ This deed, which was granted by a person having *full power* to settle his succession in the way he thought proper, contains a long destination of heirs, consisting of different substitutions, and fenced with the usual clauses of restriction.

“ There is, first, a destination in favour of *Sir William Drummond, and the heirs male of his body*, and other substitutes, which substitutes have all failed, and the last heir-male of the body of Sir William Drummond was the last Duke of Roxburghe, who died in 1805.

“ This *failure* of the heirs called by the *first* destination, necessarily makes room for the *following part of the destination*, and the heirs thereby called to the succession.

“ *This part of the destination* is expressed in the deed of nomination as follows :—‘ And whilks all failing be decease, or be not observing of the provisions, restrictions, and conditions above written, the right to the said estate shall pertain and belong to *the eldest daughter of the said umquhil Hary Lord Ker without division, and their aires male*, she always marrying, or being married to an gentleman of honourable and lawful descent, who shall perform the condition above and under written, whilks all failing, and their said aires male, to our nearest and lawful heirs-male whatsoever.’

“ This clause, which has now become of so much importance, it must be admitted, has been framed with very little judgment or ability by the writer, contrary to the usual practice. *Brevity* has been studied at the expense of *clearness* and *perspicuity*. Accordingly, it has already been the subject of more argument and discussion, both in writing and *viva voce*, than perhaps ever was bestowed upon any composition of the same length.

“ Upon the *import* of it two questions arose almost at first view, and which were anxiously discussed in the competition between Sir James Innes and General Ker.

“ 1. Whether the expressions, *eldest dochter of Hary Lord Ker, and their heirs-male*, shall be understood as only applicable to *one daughter* ; or, whether it shall be understood to call the *whole daughters seriatim*, according to seniority, and their heirs-male.

“ 2. The other question, Whether the expression, *heirs-male*, as they stand in the above clause, and connected with the other parts of the deed, are to be understood as meaning *heirs-male general*, or heirs-male of the body.

1812.

LADY E. KER
v.
INNES, &c.

" These questions were fully considered by the Court ; and the majority of the judges being of opinion that the words imported a destination to *all the daughters* of Lord Ker *seriatim*, and that heir-male must be understood as limited to *heirs-male of their bodies respectively*, the Court ultimately found that the heir-male of the body of Lady Margaret Ker was to be preferred in the competition, upon his proving his propinquity.

" This was carried by appeal to the House of Lords ; fully argued, and considered with a degree of attention almost unexampled by the judge who gave his opinion on the above two questions.

" The substance of that opinion coincides with that of the majority of our judges here, was formed into the shape of a motion, to be considered by the House on the first cause day next session.

(Reads the words of the motion.)

" According to the construction, the clause contains four substitutions, which are compressed into one, and the destination, if expressed in the usual way, would stand thus, *the eldest daughter of Hary Lord Ker, and the heirs-male of her body*, whom failing, the second daughter, &c.

" According to this destination, *how is the succession now to devolve*, in the event which has occurred ? The answer appears very simple. Begin with *first substituting* the eldest daughter of Hary Lord Ker. Lady Jane Ker has long ago failed ; *the heirs-male* of her body have also failed. Go to the next substitute, second daughter ; these have also failed. Third daughter has left *heirs-male of her body*, and Sir James Innes says that he is this heir-male.

" Under these substitutions, *what room is there for the present pursuer* ? She is *not the eldest daughter* of Lord Hary Ker, nor is she an *heir-male* of the body of such daughter. She is an *heir-female* of the body ; and had the destination been to heirs of the body in general, her claim would have been good. But the persons called are *heirs-male*, which is exclusive of all other heirs except heirs-male. The ground upon which the pursuer maintains her claim is, that the *eldest daughter* of Hary Lord Ker does not mean *singly the daughter properly so called*. But that the eldest *heir-female* of Lord Hary Ker, for the time being, is entitled to come under this description ; and many passages quoted from *style books and deeds*, to prove that, in the language of the law of Scotland, *eldest daughter* and *eldest heir-female* are synonymous.

" That a daughter succeeding under any destination, is an *heir-female*, is very true. But that a person may have *heirs-female*, who are *not his daughters*, is equally clear.

" On the passages quoted, the words which occur are, *daughter* or *heir-female*, which, in place of proving that they are synonymous, proves the direct contrary. It means either daughter, or heirs-female *who are not daughters*—a phrase commonly used in that part of the destination which provides for the case of succession, opening to

heirs-portioners; the heirs-portioners may either be *two or more daughters*, or they may stand in a different connection from that of sisters. Suppose aunts and nieces, or males who are in right of a female; and, therefore, when the word daughter is used, it is proper to add *heir-female*, not as synonymous, but in order to extend the provisions to other heirs-female, who were *not daughters*.

1612.

LADY E. KER
v.
INNES, &c.

"I must observe also, that here the destination is not to daughters in general; but to the eldest daughter of a *particular person*, Lord Hary Ker; and, further, that it is to the daughter and the *heirs-male of her body*.

"Will the pursuer produce a single instance where the *daughter of a particular person*, and the heirs-male of her body, was ever so construed as to comprehend the *heirs-female* of the daughter; or where a conveyancer, meaning *heirs-female*, ever used such expressions?

"One consequence of the pursuer's doctrine may be alluded to. Suppose Lady Jane had died, leaving a *son* and a *daughter*, and the succession opens under this clause; according to the pursuer's construction, *the daughter must take in preference to the son*: for as the destination is to the *eldest daughter*, and her heirs-male of her body—the *eldest daughter* would have succeeded in preference to her heirs-male, and if the heir-female is entitled to take as a daughter, or to come in at all, it must be *primo loco* in preference to heirs-male.

"In the case of *Kinfauns*, the estate was destined, by a contract of marriage, to the heirs-male of the marriage, whom failing, to the *eldest daughter* or *heir-female*, to be procreate betwixt them, successivè, without division. Where could there be a doubt by this destination?—the heir-female of the marriage was called, whether daughter or not, the competition was betwixt a daughter of the marriage and a daughter of the eldest son. The latter was clearly the heir-female, and entitled to succeed.

"The case *Ewing v. Miller* is not more to the purpose. A sum Kilkeran, p. provided by contract of marriage, in the event of there being no heir-462, Mor. male of the marriage but the *one daughter*, or *heir-female*. The 2308. daughter of a second son of the marriage claimed the sum thereby provided, 3000 merks. The Court found that the provision in favour of a *daughter* of the marriage *did not comprehend a son's daughter*. I should have doubted of this.

"On the case of *Bargany*, 1739, the destination was to the *eldest* Ante vol. i. p. *heir-female of the body of John Lord Bargany*, and the descendants of 237. her body without division. No doubt that the succession went to heirs-female;—the only question was, Who was entitled to claim under that character? The son of a daughter of John Lord Bargany, eldest son of a daughter of John Lord Bargany, eldest son of John Master of Bargany, or the son of a daughter of John Lord Bargany?

"The pursuer, in this case, claims to have her right declared to succeed to the estate of Roxburghe, as *heir of tailzie and provision*,

1812.

LADY E. KER
v.
INNES, &c.

under a deed of nomination, executed by Robert Earl of Roxburghe in 1648.

“ By this deed the Earl, who was vested with full and *acknowledged power*, proposed to settle the succession of his estate for a very long period, and probably he thought he had done so, in a manner so clear as not to admit of dispute.

“ The *destination, or line of heirs*, established by this deed, consists of two branches. By the first, he called *Sir William Drummond*, and certain other *male relations*, and the *heirs-male* of their bodies, and failing them, he calls to the succession the eldest daughter of Hary Lord Ker, and their heirs-male, whom failing, his own heirs-male whatsoever.

“ The *first branch* of the destination took the *estate*, and has now *failed* in the person of the last Duke of Roxburghe, so that the succession necessarily devolves upon the heirs called by the *second branch* of the destination.

“ But it unfortunately so happens, that this *important clause* is framed in so *confused, inaccurate* a manner, with such contempt of all the rules of conveyancing, as to be more like an *Omnigena* for exercising the wits of people, than a *serious settlement* of an estate. To find out the import has been the subject of more argument and discussion *viva voce* and *in writing*, than ever was bestowed upon *any human composition of the same length*.

“ At the very first view, two questions arose out of it, which were contested betwixt Sir James Innes and General Ker, 1. Whether *eldest daughter* meant only *one* daughter, the *first born*, or if it was applicable to all the daughters *seriatim*; and the second question was, Whether heirs-male meant heirs-male general without limitation, or heirs-male of the body of the daughter, or daughters respectively?

“ Both these points have been determined by a judgment of this Court, and have been approved of and confirmed by certain resolutions of the House of Lords, and therefore are at rest. But the plea of Lady Essex Ker is different from either of these, and therefore is still open for discussion; and, accordingly, the proper steps have been taken, by memorials and hearing counsel, for having it decided upon full information.

Two descriptions—eldest daughter and heirs-male.

“ The merits of the case confessedly depend upon the clause in the deed of nomination, and one thing seems to be clear, that only *two* descriptions of persons are here mentioned—*daughter* of Hary Lord Ker, and *heirs-male*. The pursuer does not say that she is an heir-male, or that this can be applied to her by any latitude of construction, therefore, if called at all, it must be under the description of daughter of Hary Lord Ker.

Meaning of daughter.

“ Daughter is not a technical law word, having a particular meaning affixed to it by the law. It is a word of common popular

language; and when it occurs in a law book, or a deed, has just the same meaning as in a book, a letter, or in common course. As to the established use of the word, in common language, argument is to little purpose. It must be determined by the popular use of the language, which every person can judge of as well as the most profound lawyer; and, according to this standard, there cannot be a doubt, that the meaning of a man's daughter is his immediate female descendant in the first degree; and this is well ascertained as the words expressing other relations—Husband and wife, brother and sister, except sometimes a figurative or poetical expression, show.

1812.

LADY E. KER
v.
INNES, &c.

"It was observed, in construing the words of an ancient deed, we must look to the language at the time when executed. It would be absurd to suppose that Earl Robert, in 1648, was speaking the language of the present day, and that, at this period, daughter had a more extensive signification, and comprehended all female descendants.

Ancient mean-
ing of the
expression.

"This proposition, if established, might be of some consequence. But counsel have failed in making it out. According to the usage of that period, I am satisfied that daughter or dochter was used in the same sense as at present. And this meaning is clearly defined in law books so far back as have any extant.

"The oldest book on our law in the English language, is Bal-four's Practicks, written in the time of Queen Mary. Speaking of the rules of succession, he says, p. 222, 'Sum aires and successors are of immediate and *nearest* degree, and sum others are of mediate and farder degree. Immediate aires the son and the dochter, quhilks failing they are of a farder degree, and mair distant sould be aires—as the nepuoy or niesse, gotton or born of the son or douchter, and after them and after others of the right line, descendant in *infinitum*.'

Authority of
Balfour.

"Skene's English translation of the Regiam Majestatem sets forth, that the expression, grandson or granddaughter were not in use in Scotland, which may have been the case. But they had an expression which answered the same purpose, now obsolete. A man's grandchild was his oye, both in vulgar language and in deeds.

Grandson and
granddaugh-
ter said to be
unknown.
Oye in the
old Scots
dialect.

"The best authority on the subject is Earl Robert himself. What expression did he use in expressing the relation of these ladies to himself? Look to the deed executed by him in 1644, which, although revoked, and of no authority in regulating his succession, may be appealed to as to the use of the language, and his use of the language.—(Deeds, p. 6.) Speaking of the ladies, with relation to their father, Lord Hary Ker calls them daughters. When speaking of them with relation to himself, calls them oyes, which is rather a presumption against his using the expression daughter to denote female descendants much more distant.

Heirs-female
said to be un-

"I was rather surprised at the assertion, that heirs-female was known.

1812.
 ———
 LADY M. KER
 v.
 INNES, &c.

Instances.

unknown in the law and practice of Scotland at this period. But this is a mistake. Heirs-female, or *hæredes-femellæ*, it is true, were terms at first not so common; for this reason, that female succession was not so common. All the old charters were *hæredibus suis*, without distinction of male or female. Afterwards *hæredibus masculis* came to be common; and when the succession was to go to females, it was *hæredibus quibuscunque*, or *hæredibus fæmellis*.

“ Some instances of *hæredibus fæmellis* were mentioned, and, upon searching the records, they will be found not uncommon. In a publication now going on of the Charters of Robert the First, and succeeding kings, several examples will be found of an early date; and still more in the Index of Charters, published by Mr. Robertson, keeper of the Records.

“ Among other instances, one appears which deserves notice. A charter of the Earldom of Ross, in the reign of David II. Anno 1370. (p. 90), thus: ‘Et quando ipsi hæredis femella fuerint semper senior hæres femella sine divisione, &c. comitatum te-neat.’ So that if one meant to establish a line of female succession beyond daughters, properly so called, and that the eldest should succeed *without division*, there was no want of words to express it.

“ Upon this point, accumulation of excerpts of deeds collected from the records, where the expressions occur, of ‘*daughter and heir-female*,’ and ‘*daughter or heir-female*,’ which are adduced as proof that the expressions are synonymous. But, in reality, they prove that they are different, and that the word daughter, by itself, was not sufficient for the purpose.

“ Every daughter, if she is an heir at all, must be an heir-female. But there are heirs-female who are not daughters. For example, the son of a daughter is an heir-female. But no one will call him daughter.

“ Therefore, where female succession is not to be limited to daughters, it is necessary to add the general expression, or heirs-female, meaning that the succession shall go to daughters, or to heirs-female, whether they be daughters or not. Thus, in a contract of marriage, failing heirs of the marriage, the estate is destined to the *eldest daughter*, or heir-female of the marriage. When the marriage dissolves, there may be no daughters existing, but *sons by a daughter*, who are not considered to be daughters; and, therefore, to supply the defect, the general expression of heirs-female is added, which includes the whole.

“ Most of the clauses in the excerpts relate to the excluding division, among heirs-portioners, in the case of female succession. The maker in the settlement wants to exclude the evil of division through the whole. Looking forward to a distant period, not knowing whether the heirs-portioners are to be daughters of the last proprietor, or descendants male and female, who are all heirs por-

tioners, first takes the expression, eldest daughter, and then adds the words heirs-female, which includes every possible case of female succession.

1812.

LADY K. KER
v.

"If in any deed they have been used as synonymous, this would just afford an instance of a *writer* having used expressions of which he did not understand the proper meaning, of which instances not a few might be discovered, in a search of the records less laborious than this.

JAMES, &c.
Suppose the words were heirs male or female.

"This discussion, with regard to the abstract meaning of daughter, in law language, is not decisive of the cause. Because, in our interpreting deeds and settlements, we are not merely to consider the words as solitary and unconnected, like words in a dictionary, but to take them as connected in the sentence or clause of the deed, and in this way may be restricted or enlarged beyond their common acceptance. Words are only used to convey the meaning of the party, and his will must be the rule, if it can be made out clearly and exactly, although he has used some words not in their ordinary signification.

Meaning of daughter as a solitary word, not decisive, must be taken along with other parts of the settlement.

"Of this mode of construction an instance has occurred in this very clause. Heirs-male standing by itself certainly means heirs-male general; yet, taking it as connected with the rest of the clause, has been construed to mean the heirs-male of the body of all the daughters *serialim*. Not a plurality of daughters, but that the same expression was successively applicable to each. Eldest for the time being. The eldest who existed at the time of the succession, or who had left issue male existing, and this was the most proper and natural meaning of the word.

And hence, on same principle, "heirs-male" have been held to mean "heirs-male of the body."

"The whole context and words of this extraordinary clause stand thus: 'To the eldest daughter of the said umquile Hary Lord Ker, without division, and *their airis male*, she always marrying or being married to a gentleman of honourable and lawful descent, and quhilks all failing, and their saids airis-male, to our nearest and lawful airis-male whatsoever.'

"Is there any thing in the context here that goes to extend the meaning of daughter beyond its usual meaning? On the contrary, the first thing to be observed is, that the daughters here called are daughters of a particular person named in the deed. It is not the case of daughters being mentioned in a long destination of succession, where no particular person, either father or daughter are known, and where greater latitude of speech may be allowed. They are the daughters of a person named, *Hary Lord Ker*, and the daughters existing and known to the maker of the settlement. This circumstance rather *narrows* the construction of daughter.

"Then follow 'and their airis-male,' and failing these heirs-male, the grantor's *heirs-male whatsoever*. Supposing it had been the intention of Earl Robert to call to the succession, not only the four

1812. daughters of Hary Lord Ker and their heirs-male, but likewise their female issue, according to the pursuer's hypothesis, how is it to be accounted for, that he should have used the expressions, heirs-male, and failing them, his heirs-male whatsoever, both which are most unfavourable to female succession that could have been chosen.

LADY R. KER,
v.
INNES, &c.

"Heirs-male may in some respects admit of different constructions, as heirs-male general, heirs-male of the body. But, in one respect, perfectly stubborn and inflexible. That they are exclusive of females, as much as if they had been excluded per *expressum*; and there is no instance where a woman has succeeded under that description, or has ever claimed under it.

Difficulty attending the pursuer's hypothesis.

"We are not to consider what might be the meaning of daughter simply, but of the daughter then existing of a particular person, and the heirs-male of her body. Will a single instance be pointed out of a female descendant of the daughter having succeeded under such a description? or a single deed from the record where such expressions were used for bringing in females? Here I must suggest a view of the case, which does not seem to have been sufficiently attended to. Supposing Lady Essex to be called, in what part of the destination in this clause was it meant that she should come in? For I apprehend, that according to her construction of the deed, her place in the order of succession must be a higher one than what she pretends to

"Eldest daughter and her heirs-male implies a substitution. First to the daughter, whom failing, her heirs-male, and, of course, Lady Jane, if alive, would have succeeded *primo loco*. But we are told that daughter is here used as a generic term, comprehending Lady Jane's female issue however remote. Must not all the persons called by this expression succeed in the same order? Or is the Court to make a distinction between the persons coming under the name daughters? That one of them, namely, Lady Jane, should succeed first as the daughter of Hary Lord Ker, and that the other persons called under the same expression should only succeed at a distant period?

"I see no ground for this distinction; the female issue called as daughters would be entitled to take as Lady Jane would have done, preferably to the heirs-male of her body. So that, if Lady Jane had died, leaving a son and a daughter, the daughter must have taken the estate in preference to the son, and in the same way, if John Duke of Roxburghe had been alive, Lady Essex would have been preferable to her brother, even to her father—a construction of the deed which leads to conclusions so untenable can hardly be well founded.

Recurring substitution.

"In order to get quit of this difficulty, counsel for the pursuer talked of a recurring substitution (a phrase quite new); the import of which is understood to be, that the heirs-male of the body of Lady

Jane having failed, the female descendants are now entitled to come in as called after them. 1812.

“ But where is the authority for adopting this order of succession ? LADY E. KER,
v.
INNES, &c.
Failing Lady Jane and the heirs-male of her body, Who are substituted ? The next eldest daughter, and the heirs-male of her body, and so on through all the daughters, ‘ quhilks failing and their heirs-male, to my nearest heirs-male whatsoever.’ This is the sound construction of the deed as adopted in the House of Lords, which finds, that according to the just and legal construction of this clause, ‘ the several daughters of Hary Lord Ker, in their order, and ‘ the heirs-male of their respective bodies begotten *seriatim*, were ‘ called as heirs of tailzie and provision.’ This implies, that first the eldest daughter, and the heirs-male of her body were to take, and failing them, the next daughter and her heirs-male were to take. In order to make way for this recurring substitution, it would be necessary to interpolate a substitution immediately after the heirs-male of the bodies *seriatim*, whom failing, the heirs-female of their bodies—an interpretation for which there is no authority, and which would be making a will for Earl Robert, in place of interpreting the one made by himself.

“ After all, the expressions of this clause, whether taken together Result of the or separately considered, appear very unfavourable to the pursuer’s whole claim, particularly this calling of heirs-male ; first heirs-male of the bodies, and then heirs-male whatsoever.

“ I have attended to the pleading of counsel. I admired the ingenuity of what they made out, and the intrepidity of what they attempted, without making it out. I do not see how they could have succeeded, except setting aside these expressions by arguing them out of their place in the deed, or unless they could do what is more practicable by argument, change the sex of their client, and make a man of her, and then success would be certain.

“ The only other topic of argument introduced, was the general Argument scope and intention of this deed, which, in some cases, where the from general will of the party is clearly manifested, is allowed to control and explain scope and intention of the particular clauses ; and, accordingly, both parties have appealed this deed. to this source of interpretation.

“ One thing is clear, beyond a question, that Earl Robert had a predilection for male succession, which was agreeable to the established practice, and to the feelings which were prevalent at the time. This is not disputed, and is clear from every line of the deed.

“ The first persons called to be the representatives of his family, are a set of male successors—the Drummonds and Flemings,—and the heirs-male of their bodies. In this first and favoured part of the destination not a single female is admitted. The succession goes to males, and to them only. But supposing these favoured substitutes, and their male line, to be extinct, an event which has hap-

1812.

LADY E. KER
v.
INNES, &c.

pened ; in what manner was it natural to suppose that the Earl, prejudiced in favour of the male line, would carry on the succession ?

“ Heirs male of his own body he had none. But his son, Lord Hary Ker, had left four daughters. If he adhered strictly to male succession, the whole of his posterity would have been cut off.

“ What therefore was most natural for him to do ? Just what I conceive he has done, to break through the male succession so far as to call these daughters *seriatim* ; and with this interruption the male succession immediately returns, the heirs male of the daughters, and failing them, the heirs male whatsoever.

“ The four daughters of Hary Lord Ker were persons existing at the date of this settlement, and known to the Earl.

“ As to all the rest of the posterity they were unborn,—who they were to be, or what their qualifications, were unknown. When Earl Robert looked forward to them in distant prospect, he could know of no distinction, except the natural distinction of males and females ; and it was natural for him to prefer the males, according to the ideas of his time.

“ Whether this was proper, or a rational plan of settling the Roxburghe estate, is of no consequence. Earl Robert had the absolute power of settling his estate as he pleased, without being answerable to any one. Our only business is to inquire what his will was, and, being satisfied of that, we must give effect to it.

“ The lady may think her case hard. But she has no title to complain of the law, because, if the estate had been left to the disposal of the law, she would have taken the estate without a deed ; and still less can she complain of Courts of law, who can only inquire into the meaning of the deed. If she shall ultimately be excluded, it is by the act and deed, by the express will of her ancestor, Earl Robert, which we must carry into execution, and to which she must submit, however unwilling.”

On reclaiming petition for Lady Essex Ker, the Lord President stated :—

“ The argument is well stated, but the case continues the same. I cannot alter my opinion.

“ The only thing new is a various reading of the nomination,—said to be *dochters* in place of *dochter*. This depends upon very curious inspection. I thought it daughter, and every body so read it in the question with Sir James Innes and General Ker. Case of the pursuer not improved. It would make no difference upon the present argument, although it was to be read ‘ *dochters* ’ in place of *dochter*. It would have been of consequence in the former question.”

[Fac. Coll. et Mor. App. v. Manse 1.]

1812.

EARL OF
ELGIN, &c.
v.
M'LEAN.

The Right Hon. THOMAS, EARL OF ELGIN
AND KINCARDINE, L. BLACKWOOD of Pit-
treavie, Esq., ROBERT WELLWOOD of Gar-
vock, Esq., and Others, Heritors of the
Parish of Dunfermline, } *Appellants* ;

The Rev. ALLAN M'LEAN, first Minister of } *Respondent*.
Dunfermline,

House of Lords, 9th March 1812.

MANSE AND GLEBE, RIGHT TO—RES JUDICATA.—(1st.) Held that a minister of a parish, chiefly situated within the royal burgh of Dunfermline, with a landward part, was entitled to have a manse designed to him, together with a glebe of four acres of arable land ; and a grass glebe sufficient to pasture two cows and a horse, and that the sums which a predecessor in the incumbency had agreed to accept in lieu of these, did not shut out this claim. (2d.) Held that a question raised by a predecessor, in regard to the same subject, was not *res judicata*, in the circumstances, so as to foreclose the present claim at the instance of the present incumbent.

The respondent is the first minister of the parish of Dunfermline, which includes the royal burgh of Dunfermline, including the precincts of the Abbey, together with a landward part of the parish situated in the adjoining country.

He had neither manse nor glebe. The act 1592, c. 118, “ statutes and ordains that the acts of parliament made of “ before, anent manses and glebes, to be given to ministers “ of God’s holy evangel within this realm, shall be under- “ stood and extended to all abbeys and cathedral kirks “ within this realm, where no other manse nor glebe per- “ taining to parson or vicar was of before ; so that the “ minister presently admitted, or hereafter shall happen to “ be admitted, to the office or cure of the ministry, within “ the said kirk, shall have a sufficient manse and dwelling “ place within the precinct of the abbey where he serves, “ together with four acres of land, &c., with special pro- “ vision that it shall be in the option of the abbots, priors, “ and other prelates and persons whatsoever, seuars of the “ said cathedral or abbey places, either to grant a manse “ to the minister, within the precinct of their place, or else

1812. " a sufficient manse lying as commodious to the parish
" kirk."

REEL OF
BLACKS. &c.
"
W.L.S.

The act 1644, c. 31, was passed, extending the former acts as to the designing of manses and glebes, which contained this clause: "*Borrowstown kirks being always excepted,*" which was founded on by the appellants. And the act 1649, c. 45, followed, with regard to ministers' stipends, glebes, and manses, and that these two latter being once designed and built, the cost and charges were to be laid on the heritors. This act contained the following clause, which was also founded on by the appellants: " And it is hereby appointed that burghs, and the landward parts of the parish, provide all competent dwelling-places and houses for their ministers, the same not being above nor beneath the sum expressed."

The two acts of 1644 and 1649 were rescinded or repealed after the Restoration, and the act 1663 substituted, which sets forth, " Because, notwithstanding divers acts of parliament made of before, divers ministers are not yet sufficiently provided with manses and glebes, and others do not get their manse free at their entry, therefore statutes and ordains, that where competent manses are not already built, the heritors of the parish, at sight of the bishop of the diocese, or such minister as he shall appoint, with two or three of the most knowing and discreet men of the parish, build competent manses to their ministers, the expenses thereof not exceeding 1000 and not beneath 500 merks; and where competent manses are already built, ordains the heritors of the parish to relieve the minister, and his executors, of all costs of charges and expenses for repairing the foresaid manses; declaring hereby that the manses being once built and repaired, and the building and repairing satisfied and paid by the heritors in manner aforesaid, the said manses shall thereafter be upholden by the incumbent ministers during their possession, and by the heritors in time of vacancy, out of the vacant stipend." Then follows the stipulations with reference to glebes: " In like manner ordains that every minister have fewel, foggage, feal and divots, according to the act of parliament made in the year 1593; as also that every minister (except such ministers of royal burghs who have not right to glebes), have grass for one horse, and two kine, over and above their glebe, to be designed out of kirk lands, and with relief according to the former acts of parliament standing in force."

In these circumstances, the appellants contended that the minister's right to manse and glebe did not apply to parishes situated for the most part within royal burghs. That the clause in the act 1644 excepting "Borrowstown kirks," and the provision in the act 1649, giving *dwelling-houses* to ministers within such burghs; and the clause in the above quoted statute 1663, showed that such ministers were neither entitled to manses nor to glebes. This being their view of the acts, the respondent presented his petition to the presbytery of the bounds, stating, That by an act of the Scotch parliament 1592, ministers of abbey kirks are entitled to a sufficient manse or dwelling-house within the precincts of their abbey; and that by act 1663, c. 21, ministers of all landward parishes, whether connected with a burgh or not, are entitled to a manse, and also to a glebe, consisting of four acres of arable land, and as much pasture land as is necessary for pasturing a horse and two cows.

The respondent further stated, that he was unprovided in a manse, having only forty pounds Scots (*i. e.* £3. 6s. 8d. Sterling) yearly in lieu of one; that his globe was not of the legal dimensions, and that in place of pasture ground he had only twenty pounds Scots (£1. 13s. 4d. Sterling) yearly allowed him for grass. He therefore prayed the presbytery to order a visitation, and to take the usual steps appointed by law for designing a legal manse or glebe.

After a variety of proceedings before the presbytery, that June 7, 1803. court pronounced the following judgment: "The presbytery having considered Mr. M'Lean's petition, and the whole of this cause, find that he is in law entitled to a manse or dwelling-house, and suitable offices, within the precincts of the abbey of Dunfermline, in lieu of the forty pounds Scots presently paid to him, to a legal glebe, consisting of four acres, and to half an acre of ground as a stance for a manse, offices, and garden enclosed with proper walls; the presbytery find, that Mr. M'Lean is entitled to grass or pasturage for one horse and two cows, in lieu of the twenty pounds Scots presently paid to him; and they also find that the pigeon-house upon the glebe ought to be removed. The presbytery delay the designation of a manse and the ground for pasturage." At a subsequent date they proceeded to design these, and also correct the deficiency in the size of the glebe, so as to make it up to the full legal quantity of four acres.

The appellants then brought the present case by advocacy before the Court of Session.

1812.

EARL OF
ELGIN, &c.
v.
M'LEAN.

July 1803.

1812.

KARL OF
ELGIN, &C.
P.
M'LEAN.

The question brought before the Court by this advocacy being, Whether the judgments of the presbytery were well founded under the act 1663, c. 21? the respondent was advised to bring a separate action against the officers of state, and certain persons having interest within the precincts of the abbey of Dunfermline, libelling upon the act 1592, c. 118, and concluding that he had right to a manse within the precincts of the abbey, by virtue of that act. But as the Court adhered to the judgments of the presbytery, finding the respondent entitled to a manse under the act 1663, c. 21, it became unnecessary for the respondent to rest upon his subsidiary claim under the act 1592, c. 118.

The appellants maintained, 1st, That the general question here was, Whether, in the case of a parish where there is a royal burgh, *and likewise a landward part*, the minister is in the same situation with respect to the right of having a manse, as the minister whose parish does not contain a royal burgh, or is a mere country parish? They contended, 2d, That the respondent, being a minister of a *royal burgh*, had no right to a manse; and, in the 3d place, That this question had been definitively settled in the Court of Session in 1750, in an action raised by his predecessor and the heritors of the parish, and therefore the exception of *res judicata* was a complete bar to the claim.

It was more in detail argued, that as the act 1644 excepted *Borrowstown kirks*, this must mean all parishes where the church was situated within a burgh, whether there was landward parish annexed to it or not. In answer, the respondent contended that the minister of every landward parish, not excepting parishes connected, as this was, with burghs, was entitled to a manse under the act 1663, and other acts of parliament. That the Court had never refused manses to ministers whose benefices were so situated. That the decisions of the Court had only refused manses to ministers whose parishes were wholly within burgh, or upon some other special grounds. That it had been decided in the

Mor. 5121.

case of Williamson, so far back as March 26th 1685, that the heritors were liable for the reparation of the manse, though Williamson was minister in a royal burgh, because it has a manse and glebe, and landward parish. Several decisions since that time have been pronounced unfavourable to the claim of ministers of royal burghs, having part landward parishes; but these all went on specialities, and

cannot be viewed as having settled the general point ; and the recent decision in the case of the minister of Linlithgow against the Heritors, 6th March 1802, where the parish was in a similar situation, the minister was held entitled to a manse, but leaving the question as to the proportion of the expense to be borne by the heritors and the proportion by the magistrates of the burgh for discussion. It was stated from the bench, in this case, as had been done in the previous case of Dysart, that all the previous cases had proceeded on specialties. Indeed here there was evidence that the first minister of Dunfermline anciently possessed a manse. This is put beyond doubt by a decision observed by Lord Durie, as early as 13th Feb. 1629, in the case of Lord Dunfermline v. M'Gill, minister there, thus : " In a suspension of charges, for removing from a minister's glebe, upon a reason that there was as much land as would extend to four acres nearest to the manse, and nearer than the land designed, which was condescended to be of the lands within the precincts of the abbey, and which the suspender alleged ought to be designed, conform to the act of parliament anno 1512, the same being arable land. This reason was not sustained, because the land within the precinct condescended upon, was parked in within the precinct which was now become the King's Park, and the abbacy being annexed to the crown, and the said precinct kept for the King's Park, and the land never being laboured or tilled before. Neither was it respected, that the suspender alleged, that the same might be tilled, and was commodious for that use ; and that the minister had this manse within the precinct, which ought to draw with it the glebe."

It appears that, in 1658, some dispute had arisen between the minister and the town and the heritors of the parish, which ended in a contract, whereby the minister for the time being agreed to the sum of forty pounds Scots in lieu of manse, and the other sums as stated in his petition.

These circumstances showed clearly that the minister was at one time in possession of a manse. Then again, with reference to the plea of *res judicata*, the circumstances of that plea are soon disposed of. The question there discussed with his predecessor in 1750, went on the ground of the presbytery not having any jurisdiction to design a manse under the act 1663, and the Court confined themselves to particular findings, without deciding the general abstract

1812.

KARL OF
ELGIN, &c.
v.

M'LEAN.
Fac. Coll. vol.
xiii. p. 504.

Mor. App. 1.
Manse No. 1.
Note.

The Heritors

of Dysart v.

The Magis-

trates of

Dysart in

1777, (un-

reported.)

Durie, p. 425.

et Mor. 5137.

1812.
 EARL OF
 ELGIN, &c.
 v.
 M'LEAN.

point of law, to the effect that he was not entitled to a manse under the act 1663, and that the presbytery had no power to design him one, but reserving his claim for a dwelling-house under the act 1592. No decerniture, however, followed. With these findings it was remitted back to the Lord Ordinary, but no further procedure took place before the Lord Ordinary; and, in point of fact, there was no final interlocutor or decree pronounced that could be extracted. Even there was no decree of absolvitor; and nothing upon which the plea of *res judicata* could be founded.

The Lord Ordinary, Woodhouselee, reported the case to Jan. 17, 1805. the Court. The Court pronounced this interlocutor: "The
 " Lords repel the reasons of advocacy, and remit the
 " cause *simpliciter* to the presbytery, except as to the re-
 " moval of the pigeon-house, with regard to which, find it
 " incompetent for the presbytery to take cognizance there-
 " of, reserving to the minister to apply to the Judgeordi-
 " nary for having the same removed, and to the other par-
 " ties concerned, their defences as accords."

On reclaiming petition, confined to the point of *res judi-*
 Nov. 9, 1805. *cata*, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The question here is, whether the minister of a parish, consisting of a royal burgh and a landward part, is entitled to have a manse designed by the presbytery, to be built at the expense of the heritors, under the construction of the act 1663. The act says, that where manses are not already built, *the heritors of the parish* shall build them, a term surely not applicable to royal burghs, and therefore if the act be construed as extending to parishes comprehending a royal burgh, if there be also a landward part, the whole expense would necessarily be thrown upon the owners of that part, however inconsiderable it might be, a piece of injustice which could never enter the mind of the legislature. When a burden is laid upon heritors, it is perfectly understood to be apportionable by their valued rent, but a burgh has no valued rent. Where a burgh is subjected, regard is always had to the mode of payment peculiar to burghs. In a word, this act of parliament, to those who consider that the legislature must have had in view, how it was to be executed, or how it could be extricated, is the same as if it had expressly limited the enactment to country parishes, or parishes in which there

was no burgh. This is rendered clear by the rescinded acts 1644 and 1649, which make a marked distinction between Borrowstown kirks and proper country parishes; and that by Borrowstown kirks was not meant merely parishes entirely within burgh, or which had no landward part, is demonstrated by the act 1649, which laid down one rule as to manses, which were to be built by *heritors*, and another rule with respect to the provision of dwelling houses for the ministers of burghs, and the landward part of the parish, which last part of the act was omitted in the act 1663. And that this is the proper construction is demonstrated by the usage subsequent. If it had been understood to authorize the building of manses at the expense of the heritors, in parishes containing both a burgh and a landward part, how comes it that there should be so many parishes of that description at this day without a manse? For near the period of a century after the passing of the act 1663 there is not the least trace of a demand made by any minister of a parish so circumstanced, to have a manse at the expense of the heritors. The first time it was broached was in the case of Dunfermline in 1750, but the claim there was negatived, as not being founded on the sense of the act; and the same decision was given in four other cases between that period and 1784. It has been doubted whether these latter cases did not go on specialties; but there can be no doubt about the Dunfermline case, which decided the general abstract question. But whatever may be thought of the general abstract point, it is clear that the respondent's demand is barred *exceptione rei judicatae*. Nor is it any answer to say, that this exception only applies to cases between the same parties, and that no decision come to in the time of a previous incumbent can raise up such a plea, but these pleas are untenable. It was brought by the minister of the parish, and that is enough. To say that a decree in an action brought regularly by a beneficiary, and which he alone, as such, can bring, is not binding on his successors, is to maintain that a question relating to a benefice can never be settled to the end of the world. Nor are the proceedings which are reported by Durie in 1629 any evidence that anciently the incumbent had a manse, and this, together with the agreement in 1658 giving him forty pounds Scots *in lieu of a manse*, are proofs entirely against his claim.

Pleaded for the Respondent.—The respondent, in common with every other parochial minister in Scotland who

1812.

EARL OF
 ELGIN, &c.
 v.
 M'LEAN.

1812.
 —————
 EARL OF
 ELGIN, &c.
 v.
 M'LEAN.

has a stipend out of the tythes of the parish, is by law entitled to a manse, and also to grass for a horse and two cows, and a glebe consisting of four acres of arable land. 2. Because the first minister of Dunfermline was at one time in possession of a manse, and it cannot hurt the respondent's claim that some of his predecessors accepted of a sum of money in lieu of a manse and grass ground. 3. The plea of *res judicata* opposed to the respondent's claim for a manse, is a plea depending upon the practice of the Court of Session, to whom your Lordships will give respect in what regards a rule of their own Court. But the plea is in itself obviously not well founded; 1st, Because the action in which the judgment in 1750 was pronounced, regarded only the jurisdiction of the presbytery, and the judgment therefore cannot be considered as binding, in so far as it may be supposed to have decided any thing more than the question of jurisdiction. 2d, Because the interlocutors in that proceeding were never applied, and no decree ever was pronounced. 3. Because those interlocutors, in so far as they may be supposed to have determined the merits of the minister's claim to a manse are referable to the ground, that *Mr. Thomson* was barred by *his acceptance* of manse mail; but this plea cannot affect the respondent, who was no party to that contract. And, 4th, Because even if these interlocutors should be considered as having proceeded upon more general grounds, they are not binding upon the respondent, who does not represent his predecessor to the benefice.



After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *Wm. Adam, William Erskine.*

For the Respondent, *Henry Erskine, Arch. Campbell,*
Fra. Horner.

NOTE.—For sometime after this decision, it was thought, and frequently discussed, that the above case, in the House of Lords, was not affirmed on the general question, but went on specialties, until the subsequent decision in the House of Lords in the case of *Auld v. Magistrates of Ayr*, (*Vide 2 S. and M'L. p. 600*), where the judgment of the Court of Session was reversed, and the case remitted, “with an instruction that it is fixed by the judgment of the

" House of Lords in the Dunfermline case, that the minister of a
" royal burgh, having a landward district annexed, is by law entitled
" to have a manse assigned to him."

1812.

—
KER
v.
INNES.

(Before the Lords' Committees for Privileges.)

ADDITIONAL CASE* FOR SIR JAMES INNES KER, BART.,

Claiming the Titles, Honours, and Dignities of Duke and
Earl of Roxburghe, Marquis of Beaumont and Cessfurd,
Earl of Kelso, Viscount of Broxmouth, and Lord KER of
Cessfurd and Caverton.

House of Lords, 11th May 1812.

ROXBURGHE PEERAGE CAUSE—INTEREST TO APPEAR.—Two ques-
tions of law were made in this case. 1. Whether the deed of
nomination of heirs, and tailzie 1648, carried and conveyed, along
with the estates, the titles and dignities of the Earl of Roxburghe?
2. Who were the persons in law entitled to succeed to the digni-
ties under the destination in that deed, of " the eldest dochter of
thesaid Hary Lord Ker, without division, and yr airis maill?" The
House of Lords held, 1. That the honours and dignities of the Earl of
Roxburghe were conveyed by the deed 1648; and, 2. That the
destination to the eldest daughter, meant the eldest daughter at the
time of the succession opening. The question then assumed two
branches, 1. As to the honours and dignities of the barony of
Roxburghe; and, 2. The Earldom and Dukedom of Roxburghe.
Held, as to the first, that none of the claimants had established
any right to that dignity or honour. But as to the second, that
Sir James Norcliffe Innes had made out his claim to the digni-
ties of the Dukedom and Earldom of Roxburghe.

Principles of law laid down for allowing parties to appear for
their interest in peerage questions, in which Mr. Bellenden Ker
was not allowed to appear, but Lady Essex Ker was allowed to
appear.

The original case for the claimant was given in in 1808,
along with that of General Ker. On account of the con-
nection between the claim to the honours of the Rox-

* This and the following case, though not strictly appeals, are re-
ported here, because they are intimately connected with the Rox-
burghe causes, and complete the series of those appeals.

1812.

KER

v.

INNES.

burghe family, and the claim to their landed estates, that case entered into a statement of deeds more extensive than would have been necessary, if there had not existed such connection.

Since that period, various points have received decision in the last resort, in regard to the estates of the family; and the situations of the different parties, competitors for these estates as well as for the honours, have been materially altered.

The claimant, therefore, conceives that it may contribute to convenience, to bring shortly into view, first, What has been already done; and, second, What remains to be done, on the subject of the claim to the peerage.

On behalf of the claimant, Sir James Innes Ker, the following documents have already been produced and proved before the Lords' Committees of Privileges.

1. The patent of the dignity of an Earl granted to Robert Lord Roxburghe in 1616, by which he was in all time coming directed to be denominated Earl of Roxburghe, Lord Ker of Cessfurd and Cavertoun.

July 17, 1643. 2. Procuratory of resignation executed by Robert Earl of Roxburghe of his estates and of his dignities.

3. The notarial instrument of resignation proceeding upon that procuratory, 26th Feb. 1644.

4. The charter granted by King Charles the First, to Robert Earl of Roxburghe, of his estates, and of his dignities to himself and the heirs-male of his body, "Quibus deficientibus hereditibus suis vel assignatis quibuscunque in ejus optione designandis, nominandis vel constituendis, per ipsum aliquo tempore in vita sua vel ante ejus decessum per assignationem designationem nominationem seu declarationem sub subscriptione," &c. Dated 31st July 1646.

5. An exemplification of the act of Parliament, ratifying the above charter. 11th June 1648.

6. The tailzie, nomination, and designation, executed by Robert Earl of Roxburghe, of his estates and of his dignities. 23d February 1648.

7. An exemplification of an act of Parliament of Scotland, 20th May 1661, again ratifying the aforesaid charter of 31st July 1646, and the foresaid tailzie, nomination, and designation of Robert Earl of Roxburghe of 23d February 1648.

Upon these, and upon the patent of the Dukedom of Roxburghe, to be afterwards mentioned, the right of the present claimant was founded.

By the previous appeal it has been seen upon what ground General Ker's claim was founded to the estates and dignities, ante p. 333.

1812.

KER
v.
INNES.

Both stated a preliminary objection to the right of Mr. Bellenden Ker, as well as to the right of Lady Essex Ker, appearing for their interest before the Committee of Privileges, which objection was disposed of by the Lord Chancellor in the following manner.

LORD CHANCELLOR (ELDON) said,—

“ My Lords,

“ Your Lordships are aware that an objection was taken before the Committee of Privileges on the part of Sir James Innes Ker and Brigadier-General Walter Ker, against the right of Mr. Bellenden Ker and the Lady Essex Ker, who do not claim the dignities, to be heard as parties before the committee, against those who do claim those dignities; and that this objection was referred by the committee to be considered by the House. Upon this point counsel have been heard for several days.

“ The chief objection is made to Mr. Bellenden Ker; as to Lady Essex Ker, the objection taken is but faintly stated.

“ Of the latter, it is to be remarked, that she disputes the right of all the other claimants, and says she has a better right; though she has not laid a claim thereon to his Majesty. Mr. Bellenden Ker is in a situation perfectly different; he makes no suggestion of a claim to the dignities, but he insists he has an interest to be heard, because he says the dignities can only be given to the claimants on a construction of certain deeds, and which he says will affect his right to those estates, which also originally passed by the same deed.

“ I conceive it is impossible to say that this kind of *concern* is a proper interest. From the practice in this country, familiar instances might be adduced upon this point. A person might have devised, by will, landed estates, to different individuals, in nineteen different counties, and in a question betwixt the heir at law and the devisee in one of these counties, as to the validity of the will, not one other of the nineteen devisees, though their interests depended on the same question with regard to the will, could be heard for his interest.

“ Mr. Bellenden Ker is admitted to have a direct interest in the competition of brevies, but with regard to the peerage he has no such interest. And I hold it to be quite clear, that, according to all the rules that prevail in this House, unless he has an *interest in the very thing* to be discussed, he has no right to be heard with regard to it.

“ On his behalf, various cases were cited. (The cases cited were

1812.

 KER
 v.
 INNES.

those of Willoughby *v.* Parkham, Kircudbright, Sutherland, Caithness, Anglesea, and Glencairn. In the four first, all having interests, were ordered to be heard. The Anglesea case is stated in the Glencairn case). Of these, I shall only mention the Anglesea case, as it alone appears to have reference to this question. In that case, the question turned on the legitimacy of the claimant; and the ancestor of Lord Mulgrave, who had right to certain estates, if the claimant was a bastard, presented a petition, praying to be heard against the claim to the peerage, as the decision therein would affect his right to the estates. He was upon this admitted to be heard.

"It is impossible to say that this petitioner had an *interest* in the dignity; he could not take the peerage in question. If he was admitted upon the point of *interest*, it is clear that this case proceeded upon a bad principle. But if it proceeded upon a point of *discretion*, this may have been very properly decided. In claims of peerage you always proceed with deliberation. The question of legitimacy was one in which the House might look for information from a private party, as being more fully within his research, than in that of the Attorney-General or Lord Advocate.

"But in every case, this House must exercise a sound discretion, and consider what is fit to be done, otherwise claimants might be put to a ruinous expense. In a Scotch peerage, destined to heirs whatsoever, you might have 1500 petitioners at your Bar, were such discretion not to be exercised.

"Lady Essex Ker is in a very different situation. She says she has a better title than the other claimants, by legal inheritance and descent, though she has not brought this forward by petition to his Majesty. I conceive that you are in the constant habit of hearing petitioners for their interest under circumstances similar to those in which she stands.

"With regard to Mr. Bellenden Ker, his alleged right to the estates gives him no interest in the dignity. It is quite clear that he is not to be admitted as matter of right.

"That brings it to the question, if, in sound discretion, he ought to be heard. And, in deciding upon this, I must call your attention also to the present shape of this business; the question referred by the House to the committee is, If the titles and dignities did pass by the charter 1646, and deed 1648, to the persons described in a certain clause of the deed 1648? Whether they did so pass or not is a question in which he has no interest; he claims the estate under a different deed.

"Upon this question, we shall have the assistance of the Attorney-General and Lord Advocate.

"On the whole, I shall move that it be our instructions to the committee that Mr. Bellenden Ker is not entitled to be heard, but that Lady Essex Ker is entitled to be heard before the Committee."

This was ordered accordingly.

Two points then remained to be argued in the competition for the estates and honours. Whether under the words "Richt to the said estate," in the deed of tailzie, nomination, and designation, executed by Robert Earl of Roxburghe in 1648, the titles and dignities of Earl of Roxburghe were conveyed? 2d. What was in law the true intent and meaning of the following clause in the same deed, "And qlkes all failing be deceis, or be not observing of the provisions, restrictions, and conditions above wr'n, the richt of the said estait shall perteine and belang to the eldest dochter of the said unql Hary Lord Ker without divisoun and yr airis maill, she always mareing or being married to ane gentleman," &c., and who were the persons in law to be considered as described by the word "the eldest dochter of the said Hary Lord Ker, without divisoun, and yr airis maill."

1812.

 KER
v.
INNES.

On the 18th June 1810, the Lords' Committees for Privileges, after hearing counsel for several days, came to special resolutions on both these points as follows:—

On the first they resolved,

"That under the words 'richt to the said estait,' the titles and dignities of Earl of Roxburghe are conveyed; provided Robert Earl of Roxburghe was in due form of law qualified to make the nomination contained in the charter or deed 1648; or provided every disqualification was subsequently legally removed, so as to give effect to the nomination therein made?"

Journals of
the House of
Lords.

On the second point they resolved,

"That the words, 'the eldest dochter of the said Hary Lord Ker, without divisoun,' are to be understood to describe the several daughters of Hary Lord Ker *seriatim* in their order; and that the words 'yr airis-maill,' are to be understood as describing the heirs-male of their respective bodies lawfully begotten. The Committee are therefore of opinion, that, in case there are no heirs-male of the body of Lady Jane Ker, the eldest daughter, nor of Lady Anne Ker, the second daughter, the heir-male of the body of Lady Margaret Ker, the third daughter, is to be preferred to the heir-male of Lady Jane Ker, and to the heir of line, or heir-female of Hary Lord Ker."

Journals of
the House of
Lords.

A decision to a similar effect was come to at same time by the House of Lords, in the question relative to the landed estates.

Since then the claimant has been served, retoured, and

1812. infest as heir of entail in these estates under the tailzie, nomination, and designation, executed in 1648.

KER
v.
INNES.

In further prosecuting his claim to the dignities and honours, the claimant gave in evidence, the patent of the Dukedom granted to John, the fifth Earl of Roxburghe, in 1707, founding upon the following parts thereof:—"Anna, Dei gratia, &c. Noveritis igitur nos fecisse, constituisse, creasse, et inaugurasse, sicuti nos tenore præsentium facimus, constituemus, creamus, et inauguramus, eundem Joannem comitem de Roxburghe Ducem de Roxburgh, Marchionem de Beaumont et Cessford, Comitem de Kelso, Vicecomitem de Broxmouth et Dominum Ker de Cessford et Caverton, dando, concedendo, et conferendo sicuti nos per præsentem damus concedimus et conferimus in dictum Joannem Comitem de Roxburgh ejusq. hæredes masculos de suo corpore quibus deficientibus alios hæredes suos titulo et dignitati Comitis de Roxburgh per priora diplomata prædecessoribus dicti Joannis Comitis de Roxburgh eatenus facta et concessa succedere destinatis dictum titulum honorem ordinem gradum et dignitatem Ducis," &c. Apud aulam nostram de Kensington 25 die. mensis Aprilis anno Domini 1707," &c.

It only remains for the claimant, in terms of the resolutions of the Lords' Committees for Privileges above quoted, to show:—

1. That there are no heirs-male of the body of Lady Jane Ker, the eldest daughter of Hary Lord Ker.

2. That there are no heirs-male of the body of Lady Anne Ker, his second daughter.

And, 3d. That the claimant is the heir-male of the body of Lady Margaret Ker, his third daughter.

(Here the case went into a detail of each of those heads.)

Under the third head, Sir James Norcliffe Innes Ker proved that his great grandfather, Sir James Innes, Knight, eldest son of Sir Robert Innes of Innes, married Lady Margaret Ker, third daughter of Hary Lord Ker, and that he was heir-male of the body of his great grandmother, Lady Margaret Ker.

Sir James did not offer any remark upon the claim to the *Barony of Roxburghe* and Cavertoun; and seemed rather to stand on his own rights to the titles and dignity of Earl of Roxburghe and Dukedom.

Sir Samuel Romilly, Ar. Cullen.

(Before the Lords' Committees for Privileges).

CASE OF THE LADY ESSEX KER,

1812.

LADY F. KER
v.
INNES, &c.

Claiming the Titles, Honours, and Dignities of the Duchess and Countess of Roxburghe, Marchioness of Beaumont and Cessfurd, Countess of Kelso, Viscountess of Broxmouth, Baroness Ker of Cessfurd and Cavertoun, and Baroness Roxburghe.

Sir Robert Ker of Cessfurd, who was born in the year , and died in the year 1650, was first raised to the dignity of a Baron, or Lord of Parliament in Scotland, by the title of Lord Roxburghe; but in what year, or by what form of creation, the claimant, with all the diligence which she has employed in the search, has not been able precisely to ascertain.

In the Rolls of Parliament of Scotland which are preserved in the General Register House at Edinburgh, it appears that Lord Roxburghe is entered by that title as present in the year 1604. He is also marked as present among the peers and lords of parliament in the years 1607 and 1612.

No patent or charter has been found creating this *barony* of *Roxburghe* in the person of Sir Robert Ker; although it is strongly to be presumed, if the dignity had been granted to him by an instrument of that description, that it would have been preserved carefully with the other title-deeds of the family.

It is known, however, to your Lordships that, besides the form of creation by patent or charter, another mode of creating dignities of peerage was established in the laws of Scotland by summons and investiture in parliament, a form of granting the dignity of the peerage much more ancient in the constitution of that realm than that by patent, and which, though it became less frequent than the latter in the grant of the higher dignities, was still not wholly disused in the time of Sir Robert Ker, when the first step in the peerage was conferred.

The claimant is humbly to maintain before your Lordships, that as no patent appears, which would doubtless have been preserved if it ever existed, the title of Lord Roxburghe is to be held as having been conferred upon Sir Robert Ker by investiture in parliament; and she will then further

1612. contend, that all titles so granted, do, by the law and constitution of Scotland, descend to heirs female in default of heirs male, unless a special limitation of the descent is stated upon the Rolls of Parliament in the entry of the record of the investiture.

LADY E. KER
v
INNES, &c.

Further, she claimed right to the title of Earl of Roxburghe, because Lord Roxburghe was raised to the title of Earl of Roxburghe and Lord Ker of Cessford and Caverton, by patent bearing date 18th Sept. 1616. The limitation in this patent being "*sibi suisque heredibus masculis*."

She further deduced her title to the dignities in the same manner as it has been seen she did with reference to the estates, as follows:

1st, That the whole descendants in the male line of the body of the said Robert, first Earl of Roxburghe, and likewise of the bodies of Sir William Drummond and Lady Jean Ker, the eldest daughter of Hary Lord Ker, have failed; and also that all the younger sons of John Lord Fleming, and the heirs male of their bodies called by the deed of nomination 1648 have failed.

2d, That the claimant is eldest lawful daughter of Robert, second Duke of Roxburghe, and consequently she is clearly eldest female heir by descent and primogeniture of Hary Lord Ker; and hence she humbly presumes she has right to the honours of the Dukedom of Roxburghe.

And also, in the same character, she claims, and humbly hopes your Lordships will find her entitled to the dignity of Lady Ker of Roxburghe and Caverton.

The Lords' Committees for Privileges, after hearing counsel for several days,

Journals of
the House of
Lords.

"Resolved and adjudged, That none of the persons claiming the Barony of Roxburghe have established any title thereto, it being the opinion of this House that as the said dignity might have been granted by letters patent to the grantee, and a series of heirs not so comprehensive as to carry the said dignity to such heirs as the claimants respectively represent themselves to be, it ought, according to law, to be presumed that the same was not granted to such heirs; and it appears to this House that the said dignity has not been in fact assumed or enjoyed since the death of Robert, Baron of Roxburghe, without heirs male of his body begotten by any heir or heirs of the said Robert Baron Roxburghe."

Resolved and adjudged, That Sir James Norcliffe Innes, Bart., hath made out his claim to the titles, honours, and dignities, of Duke and Earl of Roxburghe mentioned in his petition.

1812.

KER
v.
INNES KER,
&c.

Lady Essex Ker, *J. Henry Mackenzie, Alex. Maconochie, Henry Brougham, Fra. Horner.*

(Feu Cause, Fac. Coll. vol. xiv. p. 63.)

HN BELLENDEN KER, Esq.	.	.	<i>Appellant;</i>
JAMES INNES KER, Bart., and JAMES	}	<i>Respondents.</i>	
HORNE, W. S., his Commissioner,			

House of Lords, 6th July 1812.

TAIL—PROHIBITORY CLAUSE—GRANTING FEUS.—Here the entail of Roxburghe contained strict prohibitory clauses against alienation, contracting of debt, or doing any deed whereby the estate might be adjudged, or doing any other thing to the hurt and prejudice of the said tailzie and succession; but “reserving always liberty to the said heirs of tailzie to grant feus, tacks, and rentals, of such parts and portions of the said estate and living as they shall think fitting, providing the same be not granted in hurt and diminution of the rental.” An heir of entail having granted sixteen separate feus of the whole estate, Held, in a reduction of these feus, that this was not a proper exercise of the reserved powers in the entail. In the House of Lords, case remitted for reconsideration, and with special directions.

It has been seen, in the reduction raised as to the effect of the old entail of 1648, executed by Robert, first Earl of Roxburghe, that, in anticipation of disputes arising as to the succession to the estates and honours after his death, the late Duke of Roxburghe executed various deeds, having for their object the setting aside that entail, and creating a new one in favour of the appellant.

In that reduction, ante p. 362, it was decided by the court below, and affirmed in the House of Lords, that the Duke held the estates of Roxburghe under a strict entail (348) against alienation, or altering the order of succes-

1812. sion, or contracting debt, and that he could do no act in contravention of these prohibitions.
- KER**
v.
INNES KER,
&c.
New entail
trust-deed,
dated 18th
June 1804.
- The judgment in that question went to sustain the entail of 1648 as the standing investiture, and at same time set aside the new deed of entail and trust deed executed on 18th June 1804, by Duke William, calling by this entail, failing the heirs of his own body, Lady Essex and Lady Mary Ker, they being the heirs of line of the marriage between Sir William Drummond and Lady Jean Ker, by the eldest branch of that family; next the appellant and his brother, Mr. Henry Gawler, and the heirs of their bodies, they being heirs of line of the same marriage by the junior branch of that family; and after them certain other substitutes, and it also set aside the subsequent entails of 11th Jan. and 8th June 1805. The trust deed, which was executed separately, and of same date with the first of these entails, conveyed the estate in trust to certain trustees, for payment of the Duke's debts, legacies and annuities, and after that to pay the residue of the rents, to renounce their infeftments, and to convey the estate, to the heir for the time appointed to succeed by the above entail. The other trust deed was executed of even date with the feu-dispositions.
- Sept. 26, 1804. Among other deeds, he executed sixteen feu dispositions of separate parts of the estate, in favour of the appellant, which feus comprehended the whole estate; and after this,
- Jan. 11, 1805. he executed a second entail, revoking the one of 18th June 1804 in favour of Lady Essex Ker and Lady Mary Ker, and declaring, that the parties called to the succession, immediately after the heirs of the Duke's own body, to be the appellant and his brother.
- June 8, 1805. A third entail was executed, of this date, setting forth that, as he had no prospect of heirs of his own body, he disposed the estates directly to John Bellenden, the appellant, and the heirs male and female of his body; whom failing, to the heirs called by the preceding entail.
- It appeared that, at a former period, many feus of the estate had been granted by Earl Robert and his successors. In particular, Sir William Drummond, who became the second Earl of Roxburgh, feued out large estates, which, it was stated, were still held by different proprietors. In 1663 the same Earl William entered into a contract of feu with Sir Andrew Ker, whereby the lands of Greenhead were conveyed to him in feu, the deed expressly referring to the Earl's title containing the reserved power. "*Et secundum libertatem et pri-*

“ *vilegium nobis inibi reservat.*” The feu duty payable yearly, for the whole of these lands, in this feu, amounted to £25. 12s. 4d.; and it was stated at the time of the present action, the value of these lands thus feued, would be not less than £50,000 or £60,000. Earl William, it was stated, granted many other feus of lands, amounting in value to £150,000, although the only return was a feu-duty of £200 Sterling.

1812.

KER
v.
INNES KER,
&c.

It was stated by the appellants that it did not appear that any of those feu rights were challenged except one, being that of the lands of Broomlands, granted by Earl William to Alexander Don in 1650, which being afterwards challenged, in a process of reduction raised by John, Duke of Roxburghe, in 1732, was ultimately reduced and set aside.

Duke of Rox-
burghe v.
Don, 19th
Dec. 1732,
House of
Lords, March
1733, ante
vol. i. p. 126.

The feus, in the present case, were granted under two conditions; 1st, That the Duke having executed the entail above specified in favour of his own relations, *failing heirs of his own body*; these heirs, in case they should exist, were to be preferred to the persons who were to be benefited by the feus; 2d, But if the Duke had no heirs of his own body, and the entail made by him should stand good in law, and the heirs therein succeed to the estate, the feus were to be at an end, and to be “ void and null.” In order to accomplish this transaction more effectually, according to the designs of the parties, it was necessary that other deeds should be executed simultaneously with the feu dispositions. The feu rights were divested of all but the necessary clauses between the superior and the vassal, and the irritant clauses above noticed. What remained of the agreement of parties, and was generally alluded to in the feu dispositions by the words, “ for certain onerous and sufficient causes and considerations,” was contained in a separate contract between the Duke and the appellant, and was executed on the same date with the feu dispositions. This contract narrated the trust deeds, the deed of entail 18th June, and the feu dispositions; and in this contract the appellant bound himself in several obligations, 1st, To grant to the Duke a deed of entail of the whole lands disposed to him by the sixteen feu dispositions to himself in liferent, and to his brother, Henry Gawler, and the heirs, male or female, procreate or to be procreate of his body, in fee, &c. It was also conditioned, that during the Duke’s life that he and the appellant, or after his death, the institute and heir of entail, might alter and revoke or annul, in whole or in part, the said deed of entail (of the

Sept. 26, 1804.

Contract 26th
Sept. 1804.

1812.

KEE
v.
INNES KEE,
&c.

feus). In the next place, the appellant is taken bound to pay a variety of sums to the amount of £30,000, besides annuities to divers persons to the amount of £2900. Accordingly, the entail of the feus was executed in terms of the above contract, and of same date with it.

Afterwards, the Duke executed his second entail, the destination in which has already been mentioned; and this was followed by the third entail, also above referred to. All these deeds were prepared by the Duke's own agent, Mr. James Dundas, W. S., under the assistance of counsel; and the feu dispositions, after having been regularly executed at Fleurs, were delivered to the appellant; and two copies of this contract having been executed, one was delivered to the Duke and the other to the appellant.

Such being the nature of the deeds granted by the Duke, the question was, Whether, as to the feus, they were such as were covered by the powers (duly exercised) of the entail 1648?

This depended on the prohibitory clauses in that entail of Tailzie 1648. 1648, which were as follow:—"It sall not be lawful to the
" persons before designit, and the heirs male of their bodies,
" nor to the other heirs of tailzie above written, to make or
" grant any alienation, disposition, or other right or securi-
" ty qtsomever of the said lands, lordship, baronies, estate
" and living above specified, nor of no part thereof; neither
" zit to contract debts, nor do ony deeds qrby the samen,
" or any part thereof, may be apprisit, adjudgit, or evictit
" fra them; nor zit to do any other thing in hurt and pre-
" judice of thir pntis, and of the foresaid tailzie and suc-
" cession, in haille or in part; all quhilk deidis sua to be done
" by them are by thir pntis declarit to be null, and of nane
" avail, force nor effect: *reserving always liberty and privi-
" lege to our saids airis of tailzie, to grant FEUS, tacks, and
" rentals of such parts and portions of the said estate and
" living as they shall think fitting, providing the samen be
" not made nor granted in hurt and diminution of the rental
" of the samen lands, and others foresaidis, as the samen
" sall happen to pay the time the saids airis sall succeed
" thereto."*

The respondent's action of reduction, was identically the same action with that reported, ante p. 362; but that action naturally dividing itself into two parts, the one having reference to the reduction of the entails and trust-deeds, the other having reference to the reduction of the feus; the Court.

ordered them to be separately discussed. In this, the feu cause, the respondents maintained, besides the other reasons there set forth, that the feu dispositions were all, on the face of them, so many fraudulent and unlawful contrivances and devices to defeat the standing entails and investitures of the family of Roxburghe, and to break down and diminish the said estate; and that they were obtained from a person having no power to grant such deeds, he having held the estate fettered by prohibitions against granting such deeds; that they were alienations, and that they were devised to effect an entire alteration of the order of succession. This question was reported to the Court; and the Court, of this date, pronounced this interlocutor:—"The Lords of Council and Session having advised the memorials in this case, find, that the late Duke of Roxburghe held the estate of the dukedom of Roxburghe under the fetters of a strict entail; find, that the deeds now challenged were not granted in the due exercise of the reserved powers in that entail, of granting feus, tacks, and rentals, and therefore sustain the reasons of reduction thereof, and of the sasines thereon, reserving all objections to the title of the pursuers, and to them their answers, as accords."*

1812.

KEE
v.
INNERS KEE,
&c.

Jan. 16, 1808.

Though the above interlocutor was pronounced by a narrow majority, yet the appellant, without reclaiming, thought it best to appeal to the House of Lords.

Pleaded for the Appellant.—1. The late Duke of Roxburghe held the estate in question under investitures containing the most ample powers to grant feus, expressed in the deed 1648, and repeated in all the subsequent titles of the estate, by the clause, "Reserving liberty to our said heirs of tailzie to grant feus, tacks, and rentals, of such parts and portions of the said estate and living as they shall think fitting, providing the same be not made nor granted in hurt and diminution of the rental of the samen lands and others foresaid, as the same shall happen to pay the time that said aires shall succeed thereto." 2. The Duke did accordingly exercise his undoubted power of granting feu rights, by granting those now in question, all of which are perfectly regular in point of form, and sufficient

* For Opinions of the Judges, vide Faculty Collection, vol. xiv. p. 73, et seq.

1812. **KER**
v.
INNES KER,
&c.
- in law for vesting the right of property in the appellant, as feuar or vassal of the Duke. 3. The Duke and the appellant, the parties to these feu contracts, did not, in entering into the same, make any private agreement, or come to any private understanding whatever, that the feu dispositions should be held by the appellant in trust for the Duke, or that they should in any respect be subject to his disposal, or that he should have power, in any respect whatever, to alter, revoke, burden, or control the rights thereby conveyed. 4. The objection to these grants, that they are *alienations*, and therefore fall under the prohibition, either of sales or alterations of the order of succession, is entirely frivolous, groundless, and affected; alienations by way of feu not being prohibited, but being expressly allowed by the entail. 5. The objection to the magnitude or extent of these feus is equally ill founded, as the right to grant feus is unlimited by the entail, and is as effectual in the grant of a large feu, or even a feu of the whole estate, as it is in the grant of a small feu. 6. The objection to the feu rights, that they are declared to be void and null, in case of the granter having heirs of his body, is totally ill founded, in respect that no condition or irritant clause, by which, in a certain event, the feu was to return to the granter or his heirs, is inconsistent with the nature or object of a feu right, and that more particularly this condition is not inconsistent with such feu right. 7. The objection to the feu rights, that they were to become void, in case the appellant should afterwards establish in his person a title to the superiority, under the entail executed by the Duke, or under any other entail to be executed by him, is also ill founded, in respect that such condition is not inconsistent with the nature of a feu. 8. The objection, that the feudal casualties were discharged, is ill founded, in respect that this condition is not inconsistent with the nature of a feu, *that it is the most common of all conditions in such rights*, and that it is allowed by the entail, which contains no other restraints upon the reserved faculty to grant feus, than that they should not be granted in diminution of the rental. 9. The objection to the feu rights, that they were granted as in trust, in the person of the appellant, for the benefit of the Duke himself; that they were subject to his revocation or alteration; and that he must have had power to charge these rights with burdens in favour of his creditors or legatees, is an objection founded upon groundless averments in

point of fact, in favour of which there is no evidence or presumption whatever, and which is actually disproved by the strongest evidence; and particularly by the last settlement of the Duke himself, in which he charged the trustees upon his real estate with his legacies and annuities, without so much as alluding to the appellant as being liable to such a charge. 10. The allegations of the respondents, besides being unfounded in fact, are totally irrelevant, as it was in the power of the Duke of Roxburghe to grant the feus in question, under all the supposed and fictitious circumstances which the respondents have been pleased to represent as the most exceptionable.

Pleaded for the Respondents.—1. The Duke of Roxburghe was prohibited, by the entails under which he held his estates, from granting even *bona fide* feus, of the nature and extent of those ostensibly granted in the present case. 2. The feu dispositions in question being merely gratuitous deeds granted *mortis causa* to a trustee, and forming part of a system, the whole of which was liable to revocation, were no other than a device, under a simulate form, to alter the order of succession, which was expressly prohibited by the entails. 3. There is direct evidence from all the deeds executed, and from the subsequent conduct of the parties, that no real interest *de presenti*, was either conferred, or meant to be conferred, on the pretended vassal. The estates were not taken possession of by him in virtue of the conveyances in question; but, on the contrary, continued to be managed and enjoyed by the very person who is pretended to have been divested of them, down to the hour of his death, while no attempt to give the slightest publicity to the feu contracts was ever made till the life of the granter was despaired of. Under such circumstances, it is submitted, that it is impossible to maintain that the feu dispositions under reduction possess any one characteristic of fair, legal, or *bona fide* conveyances.

After hearing counsel,

LORD CHANCELLOR ELDON said,*

“ My Lords,

“ This is the case of an appeal from an interlocutor pronounced in the Court of Session in Scotland, in a cause in which John Belenden Ker, Esq., is appellant, and Sir James Norcliffe Innes, Bart.,

1812.

—
KER
v.
INNES KER,
&c.

* From Mr. Gurney's short-hand notes.

1812.

KER
v.
INNERS KER,
&c.

and Mr. James Horne, his commissioner, are respondents. That interlocutor appealed from was dated the 12th, and signed upon the 16th of January 1808, by which this judgment was pronounced, 'The Lords of Council and Session having advised the memorials in this case, (the action of reduction), find that the late Duke of Roxburghe held the estate of the Dukedom of Roxburghe under the 'fettters of a strict entail.' I pass over so much of this interlocutor, by stating, that after long and various proceedings in this House, your Lordships were pleased to affirm that proposition of the learned Judges below, namely, that the late Duke of Roxburghe held the estate of the Dukedom of Roxburghe under the fettters of a strict entail. That Court in Scotland further found, 'That the deeds now 'challenged,' and which I shall have occasion to represent severally to your Lordships, 'were not granted in the due exercise of the reserved powers in that entail, of granting feus, tacks and rentals, 'and therefore sustained the reasons of reduction thereof, and of the 'sasines thereon, reserving all objections to the title of the pursuers, 'and to them their answer as accords.' Your Lordships will recollect, that amongst those deeds were sixteen feus, and it is represented in the cases now upon your Lordships' table, and has been stated at your Lordships' bar at great length, and with great truth, that this finding embodies a principle in the law of Scotland, of decisive importance in the general administration of the laws of that part of the United Kingdom, as to the due exercise of the power of feuing, which may be given in deeds of strict entail. The effect of these feus, if they had been sustained, would be to reduce the Duke of Roxburghe to the character (if I may so represent it) of an annuitant upon his own estate, and the persons claiming benefit from these feus would have the *dominium utile* of these lands, and after paying the feu-duties, might, in process of time, be benefited to the amount of £30,000 or more per annum. From the vast importance of this interlocutor, as it affects property in general in Scotland, at least as to those persons whose properties are protected by strict entail, and the pointing out the true meaning of the power of feuing, I need not inform your Lordships, that you have before you a case calling for the utmost attention and circumspection in regard to your decision. Against this interlocutor, which I have stated as pronounced by the Court of Session, an appeal has been lodged in your Lordships' House, and the opinion formed by the Judges of the Court of Session does not appear to have been again submitted to the consideration of that Court itself. I mention the circumstance, because, speaking with all the respect that I know to be due, and which I profess myself unfeignedly to feel, towards the Judges of that Court, yet I must say, that if this had been done, their Lordships would have had their attention anxiously called to the grounds of their decision, which are to be found in the opinions of the different Judges, (the notes of whose opinions we have upon the table), and they

might have embodied their reasons in their judgment. We might have derived great advantage from this, and have found such a statement highly useful. It would have been beneficial in the formation of our judgment, to have found it therein stated, that these deeds were not granted by virtue of that power of granting feus, but that they have been granted for the reasons upon which each of those learned persons had given his assent or dissent to that doctrine, with a view of seeing the legal grounds upon which they severally maintained that these deeds were not granted in the due exercise of that reserved power in the deed of entail of granting feus. The humble individual who now addresses your Lordships, certainly has great reason to lament that that has not been done which I have just now alluded to, and which I think ought to have been done. But, conceiving it to be the first duty, the most pressing, and most important duty upon me, to offer my advice to your Lordships, either to affirm or negative the interlocutor appealed from, I have found it my duty, in absence of any such grounds, to take the following view of this case. Before the year 1648, which is the date of the deed of entail of the Roxburghe estate and dignities, which have been so much under consideration before your Lordships, it appears that this family had certainly granted feus ; and I mark the circumstance, because it was argued at the bar, and was intimated below, (but I cannot find any distinct opinion upon this point in the notes upon your Lordships' table), that this power of feuing, is the power of feuing which may be called the administration of an estate. Your Lordships are to conceive, that a family, of this dignity and magnitude, when settling their estate or property by a strict entail, would provide that no more than a few parcels of land should be feued out, to increase villages or towns, all of which would augment the value of the estate in general, instead of diminishing it, as might otherwise happen, and this you find was a power conferred by a deed which prohibited all alienation, contracting debt, altering the order of succession, or doing any thing in diminution or hurt of the estate, or the succession to it. As to the limitations of the estate made in 1648, I need not trouble you with them, but merely state that the limitation will be found exceedingly different as to feus before that period, and between that and the succession of the late Duke of Roxburghe to the estate, and that it is not easy to reconcile those feus with those of the years which I have mentioned. In 1648, your Lordships will recollect that an entail was made, under various limitations as to different parts of the family, which I need not recall wholly to your attention ; suffice it to observe, that that deed contains the following prohibitions, fenced with irritant and resolute clauses, viz. ' That it shall not be lawful to the persons before designit, and the heirs-male of their bodies, nor to the other heirs of tailzie above written, to make or grant any alienation, disposition, or other right or security whatsomever, of the said lands, lordships,

1812.

KER
v.
JAMES KER,
&c.

1812. **KER**
v.
INNES KER,
&c.
- ‘baronies, estate and living above specified nor of no part thereof,
 ‘neither zitt to contract debts, nor do any deeds whereby the same
 ‘or any part thereof may be appraisit, adjudgit, or evictit fra them,
 ‘nor zitt to do any other thing in hurt and prejudice of thir pntis,
 ‘and of the aforesaid tailzie and succession, in hail or in part, all
 ‘quhilk deedes sua to be done by them are by thir pntis declarit to
 ‘be made null and of none avail, force, nor effect.’ With respect
 to the meaning of this clause, in Scotch deeds of entail, it will be
 necessary to say, that there must be in these instruments, prohibi-
 tions, not only against alienation, but against contracting debt, and
 against altering the order of succession. It is natural to suppose
 what has been the legal adjudication of this subject; for when we
 consider the effect of the reservation, if it have the construction
 which was contended for by Mr. Leach on the part of the appellant,
 it being in truth, (as far as £30,000 a year goes), an alteration of
 the succession, and one that has the effect of contracting debt. It is
 not unimportant, that if there be a direct prohibition, it should be
 seen that it is not an alteration of the deed of succession, or
 making a disposition, and contracting debt, which would alter the
 order of succession. We cannot construe an instrument of this sort,
 sitting as the Court of Session do, for we do it, so as not to put a
 construction upon these Scotch deeds of entail which would operate
 as an actual disposition. Then there follows this reservation, ‘re-
 ‘serving always liberty and privilege to our sds airis of tailzie to
 ‘grant feus, tacks, and rentals, of such parts and portions of the
 ‘said estate and living, as they shall think fitting, providing the
 ‘samen be not made and granted in hurt and diminution of the
 ‘rental of the samen lands, and otherwise aforesaidis, as the samen
 ‘shall happen to pay the time that the saids airis shall succeed
 ‘thereto.’ And I beg to chain down to your Lordships’ attention,
 (if I may use the expression), that this is not a separate reservation
 as to granting feus, but a reservation as to the power of granting
 tacks, feus, or rentals; and therefore the construction your Lord-
 ships are to put upon this clause must be one which is apt, suitable,
 and fitting to all the objects of it. Then follows this *proviso*, ‘as they
 ‘shall think fitting.’ ‘*They*’ must mean heirs of tailzie for the time
 being, as is proved by what immediately follows, viz. ‘providing the
 ‘samen be not made nor granted in hurt and diminution of the
 ‘rental of the samen lands, and others foresaidis, as the samen shall
 ‘happen to pay the time that the saids airis shall succeed thereto.’
 The consequence of this is, that the general prohibitions against alien-
 ating the lands, contracting debts, or altering the order of succes-
 sion, are qualified by a *proviso*, which we in England should call a
 species of alienation, although it would not be so denominated in
 the Scotch law; that is, the making feus, rentals, and the granting
 of leases, as the heirs of tailzie in possession shall, from time to time,
 see fitting, providing the rent be reserved upon all those portions of

land which was then the rent payable for the same. To English lawyers it would be a material consideration that the rental at the time the leases, feus, &c. were made, was a rental made at the time the heir succeeded to the estate. If this were an English case, nobody could deny, that if I had succeeded to this estate at the age of twenty-one, and it were rented at £21,000, and that I had lived to be ninety years of age; and when at that age the rent amounted to £90,000, nobody, I say, could deny that it would be competent to me to make a lease of that estate in trust to my family, at the rent of £21,000, and not of £90,000, that sum of £21,000 being the amount of the rental at the time I succeeded to the said estate. We shall stop here a moment, to comment a little upon these words, 'feus', 'tacks, and rentals.' What the feu was originally we certainly have not had any assistance from these notes to learn. It appears to have become a naked dry civil property, not in any ways connected with military service. At least we are not able to collect that it was so from these notes. In the course of my attention to this subject, I have been able to peruse various books, in order to get better information upon this matter. These feus now, I take it, may be represented to be something of this sort. They were granted to a vassal and his heirs, reserving certain services, which are called casualties, and which your Lordships have heard a great deal of in the course of this argument. As to leases particularly, speaking of the law of Scotland, they differ very much from leases speaking of the law of England; and if your Lordships look into authors in general, you will find they tell you that they must have a termination, or what is called an *ish* or *issue*. Now the term of 999 years *here* is like a perpetuity,—an issue that may never come,—and therefore is much the same as a perpetuity; and there have been instances of late in which undoubtedly it has been held by courts repeatedly, that the power of leasing found in a deed of strict entail, is a power of administration for the benefit of the estate, and therefore they hold that you must make such leases as are likely to be a benefit to the estate, *arbitrio boni viri*, not for the purpose of your acquiring property, but for the beneficial interest of those concerned. A rental is another species of grant, which differs (as far as I can understand it from the books) from the other two, being, generally speaking, to successors, but which would only go to the first succession of heirs. The clause must be considered with reference to all the three subjects I have mentioned. I should tell your Lordships that we have not had many of these sort of cases before us; but our assistance is chiefly to be drawn from cases in which the author of the deed has described nothing about a feu, a tack, or a rental; for the question is not here, what part of a lease, rental, or feu could be granted? which would be the case, if the author of this entail had not stated what sort of rental should regulate those grants. The *proviso* is, that there shall be granted, at the rent payable for said lands at the

1812.

 KER
 v.
 INNES KER,
 &c.

1812.

KER
 v.
 INNES KER,
 &c.

time the heir of tailzie succeeded; and the question is, first, Whether he have not intimated that as a condition? and, in the next place, whether he have not intimated *that*, as being the heir of tailzie by the construction of the Scotch instrument? (that being the construction of an English one), I thought that an heir of tailzie could let a lease at the rent payable at his own time of succession, which is given in the *proviso* itself, which makes it difficult to consider it merely as a power of management. If the case had rested here, and if there had been but one feu granted, suppose the feu of the policy of Fleurs, with the exception of the mansion house and forty-seven acres of land, (which are excepted, because I may venture to mention, that the Court of Session has held that the mansion house shall not be considered as included, whatever be the extent of the terms which describes it), and supposing your Lordships could lay out of your consideration at present that material circumstance, (speaking of it as an English lawyer), that that feu of the policy of Fleurs contains a feu of a very considerable portion of land which paid no rent at all at the time of the succession of the late Duke of Roxburghe, and which was in his own possession. This would be considered as a strong circumstance in an English deed. Supposing that the question had been in this case, Is that feu good? and that the Court of Session had not to look at the fifteen other feus, which I will represent by and bye, leaving the question then to be, whether that feu be or be not a good one? a consideration I have not seen any trace of, nor heard either in judgment nor in argument in this case. If the party were right in saying that this power of feuing was only to be exercised for the purpose of enabling them to erect houses in towns or villages, or in other places, where houses might give an additional value to the rest of the estate, if that could be made out, it would be difficult to say that, independent of the fifteen other feus, such a feu as that could stand, as that is a feu (whether the rent be £700 or £1400 a year) which is not made for any such purpose as that; and yet the first question that occurs is this, Would that one feu have been good without more? I can assure your Lordships that I have not been able to find, that which I confess I always look very anxiously for, not as deciding my judgment (because I could not be here in a Court of appeal to have any thing to decide it, but merely to assist it in its decision), I have found nothing to show me, whether it would be good or bad. Having stated that, I proceed to recall to your Lordships' recollection, not what issue they had, and what they formerly decided, as you are fully acquainted with these circumstances, but to state the facts generally. It appears, that in the month of March 1804, the last Duke of Roxburghe succeeded to this estate. I forbear to say one single word about the acts of that noble person, about his motives in the settlement, or his purposes, either as purposes worthy of him, with reference to the Gawler family, or whether or not he sufficiently attended to the old heirs of entail. I have

nothing to do with these circumstances ; as a judge, I have only to consider the legal effect of them. Whatever were his motives, they make no difference here ; if they were not good, they will not make the deeds not good if they be otherwise good ; nor will they make them good if they be otherwise bad. In other words, they will not affect the validity of these deeds. I therefore pass over that part of the subject with this single remark. He then executed a trust-deed, the particulars of which I will not trouble you with.—On the 18th June 1804, by a trust disposition, he conveyed to Mr. Henry Gawler Ker, and Mr. Seton Ker, the whole estate of Roxburghe, for the purpose of paying the sum of £3000 to the Duchess, as an additional annuity, together with the sum of £5000, in addition to the sum of £4000 provided to her in her contract of marriage, and also for paying any sum or sums not exceeding £100,000 in whole, to such person or persons, and subject to such conditions as the said Mary, Duchess of Roxburghe, my wife, in case she shall survive me, shall, by any writing or writings to be executed by her, in due and legal form, direct and appoint to be paid to such person or persons after her death.' The trustees are thereby enjoined to pay £10,000 to Mr. Hamilton Fleming, therein described as Earl of Wigton ; and they were authorized to borrow the above sums, and grant heritable securities for the same. The trustees were further enjoined to pay a variety of annuities to different persons, objects of the Duke's regard, to the amount of several thousand pounds a-year, so that the interest of the debt which the trustees were authorized to borrow on heritable security, to pay his legacies, joined to the yearly annuities, amount to no less a sum than £13,500 per annum. This deed contained an express power of revocation. His Grace executed the first entail upon the 18th of June 1804, by which he disposed the whole estates of Roxburghe to and in favour of himself, and the heirs male of his body, and the heirs of their bodies ; whom failing, to the heirs female of his body, and the heirs of their bodies—the eldest being always preferable—and succeeding without division, after which the destination is thus continued, ' whom failing, to Lady Essex Ker, sister of John, last Duke of Roxburghe, and the heirs male and female to be lawfully procreated of her body ; whom failing, to Lady Mary Ker, also sister of John, last Duke of Roxburghe, and the heirs male and female lawfully to be procreated of her body ; whom failing, to John Bellenden Gawler, Esq., eldest son of the deceased John Gawler of Ramridge, in the county of Southampton, Esq., procreated between him and my cousin-german, Caroline Bellenden, his wife, eldest surviving daughter of John. 3. Lord Bellenden, and the heirs male and female lawfully to be procreated of the body of the said John Bellenden Gawler ; whom failing, to Henry Gawler, Esq., his brother-german, and the heirs male and female lawfully to be procreated of his body ; whom failing, to the heirs male and female lawfully procreated of the body of the de-

1812.

KER
v.
INNES KER,
&c.

1812.

 KER
 v.
 INNES KER,
 &c.

ceased Diana Bellenden, daughter of the said John, third Lord Bellenden, with John Bulteel of Membland, in the county of Devon, Esq., her husband ; whom failing, to his own nearest heirs and assigns whomsoever, the whole landed estates of Roxburghe, and also the honours and dignities of the family.' This deed contains ample powers of revocation, in the following words : ' Reserving full power to me, at any time of my life, by any writing or writings under my hand, executed in legal and proper form, not only to revoke and alter these presents in whole or in part, but also to sell, alienate, or dispose the aforesaid lands, earldom, lordships, baronies, and others, or any part thereof, or to contract debt thereon, upon, or even gratuitously to dispose thereof, or burden the same as I shall think proper, as fully and freely as if these presents had never been granted ; but declaring, that any alteration or revocation shall not be inferred by implication or construction.' And, subsequently, there were deeds of entail, with references to the power of revocation contained in all of them, and it has been contended at the bar, that, all taken together, revoke the grant of the feus. These entails themselves, your Lordships will recollect, have been entirely set aside ; but, upon the question whether these entails did or did not revoke the grants, if that were argued much in the Court below, I have not been able to find any thing said in the notes of the judges, or in the judgment of the Court of Session. I might make the same observation as to another point, viz. as to whether these settlements were to be considered as *mortis causa* settlements. I do go the length of saying that there is nothing in the notes that gives any information upon that point. Upon the 26th of Sept. 1804, the Duke executed a second trust deed in favour of the same persons, and giving power to trustees to sell as much of the estate as was necessary to pay off all the legacies enumerated in the previous trust deeds. The device of making these feus was this ; it had been represented that the late Duke, being advised that his former deeds of entail were ultra the laws, and would not permit him to make such an entail, he proceeds, by the assistance of lawyers, to execute what is called a subsidiary settlement ; that is, to execute a power of granting feus. Whether they must have advised him to grant the whole beneficial interest of this estate (except so much as was constituted by the actual rental of the estate at the time, by the deeds of the grantees of the feus), or whether they thought themselves under an obligation to attend to his interest in these instruments, that it should itself be made a subject of entail, leaving out Lady Essex and Lady Mary Ker, these are motives which I do not enter into. By making an entail similar in limitation as to the granting of the feus, viz. that if granting the feus, in the exercise of the power connected with the effect of the entail of the feus, would tend not to keep the alienation exactly the same in point of property to the Roxburghe family, as in the alteration of the entail itself, if that had been consistent with the deed of 1648. If the rental had

become £40,000 a year, it would have been an alienation of the property to that extent. With this view, they say, (and I do not apprehend that, unless there be a law of Scotland which we have not heard much of, nor found in the decisions of that Court, upon the execution of a power to feu,—unless there be authority enough in point of principle and decision to say, that if a man do a thing in the form prescribed, it shall not have the effect unless it answers the form and purposes of the author), it would be difficult to substantiate it in the English law. We have some few cases that go to that proposition. If a power be given to appoint a sum of money, to be paid in such parts and proportions as a father shall think proper, to his children, we have said in our courts of equity, You shall not execute it in an illusory manner ; nothing can be allowed to answer the purpose as to one, and to elude it as to another. It is a bequest to children, and it shall be executed according to the nature of the trust. If a father see a child about to die, and, knowing that he is to be administrator of that child, make a settlement in favour of that child, a court of equity says that it is a fraud, as it is for his own benefit. The true question, in these cases, is this, whether the thing done be effected by altering the power intended ? but if it answer the purposes intended as to some, and is less beneficial as to others than he meant they should take, then it is impossible for one to say, that the power is executed as the man has given it, if it shall not have the effect which naturally should flow from it. With respect to bishop's lands, where they had a power of granting leases for seven years, it was never intended that they should,—the law has said so, and nothing can alter it. If there be an old rental preserved, a tenant for life may make a lease at the old rent, if it were intended to be preserved, or if the author said he should not preserve the old rent, he cannot mix himself so as to reform it. The true question is this, (one which we cannot get at till we have resolved a great many upon which no cases are to be found at all), Whether those sixteen feus, every one of the same date, all drawn or granted by the same person, with many of them containing estates never let at any rent at all, but in the natural possession of the Duke ; Whether these deeds are or are not granted in the due execution of the power which authorized feus, and whether they comprehend the whole estate ? 2dly, Whether they can be possibly rendered invalid by the heirs of entail of the deed of 1648, from the circumstance that it was intended to substitute another species of heirs. 3dly, What was the worth of one of these feus, if no more feus, nor any other deeds, had been granted ? *That* I would wish to know ; and next, I would wish to know whether, if one will do, two will also do ; if two will do, will six do ; if six will do, will eight do ; and if eight will do, will sixteen do ; or will any intermediate number between these be deemed proper to be substantiated ? Your Lordships will think I am making very nice and curious inquiries ; but I must ob-

1812.

KERR
v.
INNES KERR,
&c.

1812.

KER
v.
INNES KER,
&c.

serve, they are such as I am bound to make. The Judges in the Court below have stated, that these feus have not been granted in due execution of the power of feuing; and I ask, why? The Lord Justice Clerk, in an able argument, says that fifteen of these feus will do, and the sixteenth will partly do, meaning the feu of Fleurs; and the reason assigned for this is, that forty-seven acres of land are so little, by way of an appendage to the mansion house of Fleurs, that if they have no more than that number, they may as well have a stone quarry as a house; in fact his opinion is, that fifteen of these feus will stand, but there should be 700 more acres given to the mansion house of Fleurs. I ask, then, upon what principle is this said? It may with equal propriety be said, if one of these feus be bad, then all of them are bad; or if one of them be good, then the others are good. If you mean to say, that because this is an alienation of the whole estate, it is connected with those back deeds or settlements of the feu property, and therefore altogether not a grant of feus, but an alteration of the succession, by frittering away the estate; upon that principle it should not stand, although, as an English Judge, I might understand it; but to say that the fifteen feus shall stand good and the sixteenth not, is really a principle which I do not know how to grapple with. Another learned Judge, in a most able argument too, says he reserves to himself the consideration whether the policy of Fleurs and Broxmouth will do at all. He has not stated what is the principle upon which I am to say, that fourteen feus will do upon general terms, but, in all human probability, two will not do. There is another learned Judge of that Court, to whose opinion I bow with respect, from his high situation, and his knowledge of the law of that country, who expresses himself very much in the manner that an English lawyer would do, viz.—that you are to look at the terms of the power granted, and that nothing should be avoided by a judge so much as the assuming a discretionary power; but that he is to execute according to the dictates of the public law, and the will of the individual who has tested, in the actual execution of a settlement, as far as is consistent with those laws. After stating these sentiments, he says that he thinks he must support one half of those feus, and no more. Upon what principle he can support this opinion I really cannot tell. Another difficulty is, to ascertain who is the person who is to make choice of the half I am to support, or who is to distinguish it from the other half? Before your Lordships come to grapple with the great and general question, we ought to know what the law of Scotland is upon those points. It is incontrovertible that, upon this occasion, there was a contract, or something like a contract,—a binding agreement, or an honorary agreement,—that these feus should be made the subject of an entail; and I do not hesitate to say, that, speaking of these feus of entail together, they would certainly operate as an alienation in common parlance; but whether an alienation within the terms prohi-

biting an alienation in a Scotch entail, or an alteration of the order of succession, is quite a different question from what is an alienation in common parlance, and upon which I shall not pronounce.

“ There were other deeds executed by the Duke affecting the entail. They have been represented as deeds which are expressly or impliedly revoking the grants of those feus, or, in other words, as *mortis causa* deeds ; but whether, strictly speaking, they be or be not so, is the question ; yet they have been represented as *mortis causa* deeds.

With respect to what has been urged and what has been said as to the infestment, and as to whether there were infestment or not, during the life of the Duke, the question stands upon the general effect of those deeds, as operating upon the feus. These are questions upon which I have only to say, that I have looked in vain for that degree of information which I have always derived from papers laid upon your Lordships’ table from the Court of Session ; and I am not ashamed to say, that, after spending many hours in perusing them, I should be afraid indeed to determine a case which so deeply affects the laws of property in Scotland, and which so materially interests in point of value the persons who are at present suitors before your Lordships, upon such slight information as we at present have laid before us. Now it is in this view of the case that, after reading the opinions and doctrines of the Judges of the Court below, after reading all the papers, and abstracting from them with my own hand all the material matter upon every point therein stated, with an inclination to pronounce a decisive opinion, my real conviction is, that I cannot come to a proposition, either negative or affirmative, upon this subject. There is another view which is most important, if this were a case to be decided by the law of England, and it may by possibility, be the influence of the view taken from the knowledge of the law of England, by which my mind may feel more upon the subject than is justly due to it. This power, in the present case, is a power to grant feus, tacks, and rentals, provided the rent is preserved which was paid for the lands at the time of the heir of tailzie executing that power came to the estate. It would be no objection, unquestionably, that such feus, tacks, or rentals, were granted before, but that which appears to me to be extremely doubtful, or at least to admit of considerable doubt, is, whether it be possible to make any of these feus, which contain lands and subjects never feued before, and which had no rents fixed upon them on being leased or granted, so as to support those feus either wholly or in part. It appears to me that such a feu cannot be wholly supported, for it is not a feu complying with the condition imposed. If those words, for a yearly value, be to be relied upon, your Lordships would have to consider, whether the rent reserved was of adequate yearly value. But the question is, whether it were not rated at the rent which was actually paid, and not that at which it may be valued at.

1812.

KERR
v.
INNES KERR,
&c.

1812.

KRR
v.
INNES KRR,
&c.

It is extremely material, as it strikes me, in another point of view, viz. with respect to the mines and minerals. In looking into the Scotch law books upon the subject, I find it was not very usual, but the question still would be, What the tack was? Where are you to find a grant that contained a stipulation for what was to be paid for mines, if reserved in the leases? Then it may be said, that although these feus may be good in one respect, yet they may be bad as to the power here exercised; but as far only as that is consistent with the number that may be granted, they ought to be good. Now, apply this to the whole sixteen feus. If you say some feus may be made, but sixteen is an excess, then the question comes to be, What is the excess? Is it one half of the whole number, or is it only an excess of two, or is it an excess of all above part of one? Where is the line by which your Lordships are to mark out what is the excess, and what is not the excess? Then, I say, apply that reasoning to any one feu. Take that, for instance, as to the policy of Fleurs. Under the meaning of this clause, if the mines could be feued out at the rentals that were then paid, what becomes of such as never have been leased, and have no rent ascribed to them? The feu-duty being that which has reference to the entire rent of the whole of the premises, and being an entirety, what rule has the author of that deed given you so as to enable you to separate the whole of them the one from the other, or to part them so as to apply a part of the rent which would be applicable to such part of the lands as have never paid rent? The matter, I must say, appears extremely difficult of consideration in that point of view. Upon the whole, it is not my intention to go through cases which might by some be deemed proper to be alluded to, because, I say, in the first place, that cases as to the power of granting leases are not applicable to this particular case, in any one view you can take of it, for, in determining this case judicially, your Lordships ought to know what is the effect of every instrument taken separately as to its clauses, and what is the effect of them taken together; and further, we ought to be able to learn upon what ground it is that the decision in the Court below has proceeded. We find one judge attributing great weight to the circumstance of taxing the casualties; in some cases it would be no objection in my opinion; in other cases you find some judges saying that it is a decisive objection to those feus. It is fit that we should know the sentiments and reasons of these judges much more fully than we do at present upon that point. In speaking of the application of cases, your Lordships have the Greenock case. I can take that case, without bearing upon this case at all. If you can apply the principle of the *arbitrium boni viri*, then you can so determine that fifteen out of sixteen feus are to stand; but I confess I cannot see the application of that case to this complicated one. It is upon these grounds, assuring your Lordships, at the same time, that I have taken as much pains as I could, not to

send the parties from this bar, but to have come to the conclusion, either of reversing or of affirming this judgment, and that I have bestowed as much attention and assiduity upon this important question as I have ever done upon any question whatever. I confess I cannot come to a decision, that this judgment, pronounced in the Court below, is either right or wrong. In a question, therefore, of this great magnitude and value, I should advise your Lordships to do that which Lord Thurlow and Lord Rosslyn, and others, had done under similar circumstances. In calling upon your Lordships to review the whole question, and not only to review it, but submit to your consideration and adoption, a resolution by which we respectfully call upon the learned Judges of the Court of Session to state specifically the grounds upon which they consider these feus, as either granted in the due exercise, or not in the due exercise of this feuing power. Conceiving this question to be, both in point of value of property to the individuals concerned, and as involving a doctrine in the law of Scotland of the most vital importance to all concerned in estates tailzied in Scotland, it does appear to me that this is a case, perhaps the first, but unquestionably a case which requires us to make use of every means to get that information which the act of 1807 has enabled us to call for; and, in pursuance of that intention, I should propose to remit this again to the Court of Session in Scotland, and to request the Judges to state their opinions, and the reasons for the opinions which they have formed, as to all or each of the deeds sought to be reduced, taking into consideration whether they are to be looked upon as general or special; and, in their future judgment to state, specifically, whether all or any of the deeds in question were granted in conformity with the power of feuing contained in the original deed of entail; and with the request that that Division of the Court of Session under whose more immediate deliberation this question has come, shall require the opinion of the Judges of the other Division. His Lordship then concluded, with submitting to the consideration and adoption of the House, the following resolution:—

(*Vide* this at the end of Lord Lauderdale's speech.)

EARL OF LAUDERDALE said,

“ My Lords,

“ I felt great regret formerly in differing from the noble and learned Lord who has just now addressed your Lordships, when another point in this important cause was under consideration in this House. It was my resolution this day not at all to interfere in the discussion of this other very important point, if I had had the misfortune once more to differ from that noble and learned Lord, but, entertaining the sentiments I do entertain upon this occasion, I cannot avoid offering a few observations. I have read the whole of the proceedings upon this case; but finding the difficulties that

1812.

KEE
v.
INNES KEE,
&c.

1812.

 KER
 v.
 INNES KER,
 &c.

arose, in coming to a decision under the present circumstances, I had fixed the determination, in my own mind, to take no part whatever in the discussion of it, should I happen to differ from the noble and learned Lord upon the Woolsack, knowing, as I do, that he takes upon all occasions such pains in these sort of questions, and possesses such extensive legal knowledge, that he is much better able to form a correct judgment of what line of conduct should be adopted by this House, in a case involving such intricacies and difficulties, than I can possibly pretend to ; but as I find the opinion I had myself formed, so completely coincides with that of the noble and learned Lord who has stated it to your Lordships, I cannot but observe, that he has taken that view which tends, under the existing circumstances of the case, most certainly to effect the purposes of justice, those purposes which he, upon all occasions, aims at. After what has fallen from the noble and learned Lord, I shall but shortly trouble your Lordships with stating my view of the case. It is a case which arises from the deed of entail 1648, a deed of entail which stands by decisions of this House, perfect as to its clauses against alienation, and which prohibits the contracting of debt or altering the order of succession and a deed which is guarded by, and fortified with irritant and resolute clauses. It is true, however, that this deed of entail contains a clause which reserves power and privilege to heirs of tailzie, as in the words of the deed itself, 'to grant feuis, takis, and rentallis, of sik partis and portiounes of the said estait and leiving as they sall think fitting. Provyding the samyn be not maid nor grantit in hurt or diminution of the rental of the samyn landis and utheris forsaiddis, as the samyn sall happen to pay the tyme that the said airis sall succeed yrto.' Now it is obvious, in the first place, that the power of granting feus is not only reserved in this clause to those who should subsequently succeed to this estate ; but, in the second place, it is reserved under certain specific conditions, distinctly expressed by the feuar. In the first place, it is said, that they shall be such feus as the heir in possession shall think fit, a circumstance which makes me feel considerable astonishment, after hearing the opinions of the Judges below ; after stating the proper allotment of land to be feued out, saying, that it is not the heir that shall judge, but we shall be looked upon as the judges in such a case as has occurred, and shall assume the power of saying what was fit for such an occasion. I must express, in conjunction with the noble and learned Lord who addressed your Lordships, my astonishment at the judgment delivered by one of the learned Judges of the Court of Session, who, in my opinion, lays down, in the commencement of his speech, a most accurate view of the law upon the subject, and a lawyer for whose learning and judgment nobody can possibly have a greater respect than I have, for I am convinced that an abler judge does not exist. After explaining the law upon the subject, in the commencement of his opinion, he next

states how much of the land was fit to be feued out. A judge is to be looked upon in the same light as a member of a committee of Parliament, and not authorised as such to determine what part of these feus was fit for him to confirm, and what part was not fit to be confirmed. He says, in the conclusion of his opinion, in a most arbitrary manner, he says he is ready to give one half of the estate ; but upon what ground he takes upon himself to say this, I confess I am as much at a loss to discover as the noble and learned Lord who has addressed you. In short, I am completely in the dark about either the motives or the reasons of his decision. Now, in this clause, in adverting to what forms your Lordships' discussion, there is a further condition, upon which the noble and learned Lord has commented, and which is highly deserving of your Lordships' consideration, and that is, that these feus shall be so granted as that there shall be no diminution of the rental as it stood at the time when the heir in possession executed the deed. I should be at a loss to know how that clause, even standing in that shape, should, by construction, be deemed to imply nothing, for if these feus are to be set aside, it is the same thing as if that clause had actually never existed. That your Lordships can draw by inference from that clause, that it is the same as if it had not been introduced at all, is what I cannot conceive. I find this accurate and distinct condition, which shows that the entailor had his object in granting these feus in the manner he has done in this clause, which was to show that it was his intention to reserve for the future Duke, or Earl of Roxburghe, to retain that which would maintain the value of the estate, knowing that it would increase. To set aside this clause, and to imagine that the judges had full power and scope to impose what conditions they might think proper, appears to me extraordinary ; and I cannot find a distinct reason in the opinions of the Judges of the Court of Session, which tends to convince me of its justice, or to point out to me the grounds upon which they went. If, instead of setting aside the clause, they said these feus were good, even in no case, I do not know but the noble and learned Lord would have done right to send the whole matter back to that Court below before closing it in this House ; at the same time, I should have been much readier to have heard that decision, that declares these feus invalid *in toto*, than any decision that declares them valid in some cases, and invalid in others. The general tenor of decisions, as to questions of entail, in the Court of Session, when the intention of the entailor is clear that he means to prohibit alienation, contracting debts, or altering the order of succession, shows that if there be a doubt in one of them, it is the custom of that Court to find, that if the clause of alienation be deficient, it cannot be carried into effect, and may even defeat the other two prohibitions. If there be a flaw in that part of the clause against contracting debt, there would be also a flaw or de-

1812.

KER
v.
INNES KER,
&c.

1812.

 KER
 v.
 INNES KER,
 &c.

ficiency considered to exist in the other parts. I do not recollect a case where there has been a deficiency in the clause of altering the order of succession, but in my opinion it would certainly render nugatory the other two prohibitions. If I am bound to alter the order of succession, from that moment the heirs of entail lose all right, as it is they that are recently called by me, and who derive their right from me. I stand as the original entailer, and my acts could not be challenged by them. I hold that if there be a deficiency in either of these clauses, the practice of the Court is not to prop up the other two. The clause, in the present instance, that has been deficient, has been allowed to be acted upon, and yet in a manner so as to defeat the other two prohibitions. I cannot but express my surprise at the manner in which this clause of feuing is expressed, which renders nugatory these three prohibitions which the entail contains, when we consider that a deficiency in either of these prohibitions would invalidate the other two. How much farther then does this go, when we see that it is the express intention of the entailer to feu so and so, as it would partially defeat the other two prohibitions, and would be going quite contrary to those rules, as to the law of entail, by which we ought to be governed. With these opinions, I confess, that if the judgment of the Court had been directly urged, either in one way or another, but at the same time involved in all those various doubts which have been stated by the noble and learned Lord who has addressed your Lordships, I should still have thought that it was a question which, under all circumstances, ought to be remitted. I have not been able to form any opinion whatever as to how this claim will affect the lands at the time of the death of the Earl of Roxburghe, for, as far as I have read the opinions of the Judges, and other cases of a somewhat similar nature, I think I may pronounce it to be a case hitherto untouched. There are a variety of cases upon which I confess I should have liked to have heard the reasons for the Judges' opinions. In the present instance, one Judge talks of one, another of two, and a third of three of these feus, that ought, in their opinions, to be supported; and there is also another who thinks that only part of one out of the whole sixteen feus should remain valid. Such being the case, I ask your Lordships in what state would you leave the law of Scotland upon this most important point? With the clause similar to this, in the deed of entail of Robert Earl of Roxburghe, by what rule could I, as an heir of entail, have proceeded in making use of this power? If these feus were executed in a manner so as to invalidate themselves, it would invalidate the right of a future Duke of Roxburghe, even provided his feus were properly executed. Under these circumstances, I should like to know how the Duke of Roxburghe could guide himself as to a price of land for building? How many fields could he grant? He could say, that he well knew that

his ancestors acted under this very clause ; and therefore he could take it to regulate him in his conduct as to those feus that were ascertained, but I desire to know how he, or any other person who possesses an entailed estate in the country, is to regulate his conduct as to other particulars that may occur. Now, by the proposal of the noble and learned Lord to remit the case back to the Court of Session, our decision will be regulated, by the Judges informing us of the grounds upon which they can take upon themselves to say they are to set aside all or any of these feus ; and when it comes back again, we will be in such a situation as to make the law of that country perfectly certain, and our decision will have the effect, in regard to any proprietor of an entailed estate, to regulate his conduct, and to tell him how far he may go, and to inform him when he is to stop, and go no farther ; and, in short, to give him such directions that he may regulate his conduct in a manner that will assure him that he does not incur an irritancy. As to the Greenock case which has been alluded to, I can discover nothing which can lead your Lordships to imagine it ought to regulate your opinions in the case before you. It was a case relative to feuing, but there were specific reasons in that case which are not even alleged in this one, and I can only say, I am astonished to hear such authorities given in support of it. To conclude, I shall observe, that it is with the utmost satisfaction I take this opportunity of expressing my approbation of the mode of proceeding by this Resolution, which goes materially, not only to do ample justice to the parties, whose great interest and important and valuable property is involved, but, what is much more material to the country, as tending to place the law of Scotland upon such a footing, upon the point in question, as to enable persons concerned in entailed estates, to know what ought to be their line of conduct in future.

1812.

KER
v.
INNES KER,
&c.

The Lord Chancellor then again read the Resolution, remitting the question to the Court of Session, which was unanimously agreed to.

It was ordered and adjudged that the cause be remitted back to the Court of Session, to review the interlocutor complained of in the said appeal, as to all and each of the deeds sought to be reduced, taking into their consideration all objections to the validity thereof, whether general or special. And in their further judgment, to state specifically the legal grounds upon which the said deeds respectively are to be considered as not granted in the due exercise of the power of feuing, if it shall be their judgment that the same are to be so considered. And it is further ordered, That the Judges of the Division to which this cause, after this remit, shall

1812.

belong, shall require the opinion of the Judges of the other Division in matters or customs of law.

FLEMING
v.
M'NAIR.

For the Appellant, *Tho. Plumer, Wm. Adam, Mat. Ross, John Clerk, James Moncreiff.*

For the Respondents, *Ar. Colquhoun, David Boyle, Sir Sam. Romilly, Ad. Rolland, Robt. Craigie, Wm. Horne.*

ARCHIBALD FLEMING, Merchant in Greenock, *Appellant*;
JOHN M'NAIR, Agent at Greenock for the Bank } *Respondent.*
of Scotland,

House of Lords, 16th July 1812.

PARTNERSHIP—LIABILITY AS PARTNER—ELECTION.—The partnership of Hugh Mathie and Co. consisted of three individuals, who carried on business in Greenock. They had an interest in a separate adventure or concern, with other individuals, at Nassau, one of whom was Fleming in Greenock, the other Howie, in Nassau. Hugh Mathie and Co. managed this foreign business in Greenock. Mathie and Co. became bankrupt, with large bills due to the Bank of Scotland at Greenock, where Mathie had discounted them. The question was, Whether Fleming was a partner of the Company of Hugh Mathie and Co., and liable on these bills? Held him liable for three of them, upon this principle, that his connection with them in the foreign adventure, was such as led to the belief that he was a partner, and made him liable as such. In the House of Lords, it was affirmed, but by applying the doctrine of election to the case.

The company of Adam and Mathie, merchants in Greenock, was dissolved on the death of Mr. Adam, on 26th July 1799. Before that event, they had projected a plan of carrying on a separate concern in Nassau, in New Providence, with the aid and assistance of James Howie, who was to conduct the business at Nassau, receive a salary, and a certain share in the concern. But this project came to nothing by the death of Mr. Adam.

After his death, Mr. Mathie formed a new partnership, consisting of himself, John Parker, his brother-in-law, and James Jamieson, who carried on the old business, under the firm of Hugh Mathie and Co.

The appellant, a merchant in Greenock, then a partner of the firm of Archibald Fleming and Co., and who had become

acquainted with the intended project at Nassau, proposed to Hugh Mathie, then acting under the new firm of Hugh Mathie and Co., that the adventure should be resumed, and offered to take a share in it; accordingly, it was agreed, in 1799, to put into execution the original plan. Howie was to settle there, to receive a salary and share of the business. And it was agreed that the transactions connected with the adventure should be conducted at Greenock by Hugh Mathie and Co.; and as the appellant's house had a house in London, where he himself resided nine months in the year, it was agreed that he should conduct the business connected with the Nassau adventure in London.

There was no written contract of copartnery.

The Company of Hugh Mathie and Co. became bankrupts in 1803, with many bills due, or to become due, in the hands of the respondent, as agent for the Bank of Scotland, who had discounted the same. It seems Mr. Mathie had also been one of the respondent's sureties to the bank for his bank transactions; and it was alleged there was a tendency thence arising to be liberal in discounting.

Although the Nassau adventure was kept separate, unconnected in the general business of Hugh Mathie and Co., and although the appellant alleged that his connection with Hugh Mathie and Co. in that adventure, could not make him generally liable for every bill upon which the name of that firm appeared, yet the respondent, on the bankruptcy, made his claim against the appellant for three of these bills, amounting to £1000, (which form the subject of the present appeal), and also for five bills, amounting to £3999. 10s. 3d. (which form the subject of a separate suit and appeal.)

The proceedings adopted against the appellant were by charges upon the bills, whereupon he brought a suspension of those charges, stating that the appellant had never received any value for these bills; that the name of the appellant did not appear upon any one of them as drawer, acceptor, or indorser; that the appellant was no partner of the firm of Hugh Mathie and Co., and had no other connection with that company than merely that he had joined along with them in an adventure or particular trade to Nassau. And, separately, that the charges were erroneously served, being left in the appellant's house in Greenock, while he was in London, where he had been for some months, whereas, according to the forms of law, they ought to have been served at the market cross of Edinburgh, and pier and shore of Leith.

1812.

FLEMING
v.
M'NAIR.

Vide next
appeal.

1812.

FLEMING
v.
M'NAIR.

The Lord Ordinary ordered memorials to report to the Court, and this being done, the Court passed the bill without caution or consignment. On advising a reclaiming petition, in order that the case might be disposed pure of the irregularity of the diligence, the appellant's counsel appeared, and stated that he passed from these objections, and a proof having been allowed and reported, this interlocutor Feb. 10, 1805. was pronounced: "The Lords having resumed consideration of the petition for the charger, Mr. M'Nair, and heard counsel thereon, in respect of the above consent on the part of the complainer, to pass from the objections to the formality of the diligence, alter the interlocutor reclaimed against, and remit to the Lord Ordinary to refuse the bill of suspension."*

* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said,

" My Lords,

" The following facts are instructed : 1st, The project of a Nassau concern, originated 29th June 1799, Adam, Mathie, and Howie being the intended partners. But Adam having died, 25th July 1799, Mr. Fleming immediately agreed to come in his place. 2d, The firm of that Company was, Hugh Mathie and Co., under which all its business was transacted in this country. 3d, It was not a momentary adventure, but a permanent copartnery, which continued till Mathie's insolvency in 1803, and would still have continued, had not that event happened. 4th, Mathie carried on other branches of trade, particularly to Barcelona ; first by himself, then with a partner ; and it is supposed with Jameson, under same firm of Hugh Mathie and Co. 5th, The bills in question were discounted at the bank with the firm of Hugh Mathie and Co. upon them, without explanation *ex facie* of the bills for what purpose to be applied, or what Company was meant. Hence the question arises, Whether M'Nair, the holder of them on account of the bank, is entitled to demand payment from Fleming, or what defence the latter has ? I am clear that Fleming, as a partner under that firm, is *prima facie*, or by legal presumption, liable ; and that the burden of proof lies upon him of showing relevant grounds upon which he may excuse himself from liability. The holder of a bill, drawn or accepted, or indorsed by the firm of a company, has a right to go against all and every partner of that firm, whether the money has been duly applied or not, Dewar v. Miller, 14th June 1766.

Mor. 14569.

" We must take under view both the rules which govern partnership, and the nature of bills of exchange.

Unreported. " In the case of P. Forrester, even where there were no bills, but

On reclaiming petition the Court adhered, but found no expenses due.

1812.

The result of this judgment was to find that the appellant was liable in three of the eight bills, amounting to £1000,

FLEMING

v.

M'NAIR.

July 5, 1805.

only sales of goods, and where there were distinct concerns under similar firms, namely, 'P. and Fr. Forrester, Merchants, Leith,' in which there was a John Watt concerned; and 'Peter and Fr. Forrester, Merchants in Edinburgh,' yet the Court found, 27th Feb. 1798, that the Leith firm was liable for the price of goods purchased and applied by P. Forrester to the Edinburgh house, and entered in their books, unless where the creditors were aware that the furnishing was to the Edinburgh house, relief being reserved to the Leith house against the Edinburgh house.

"In the present case, if it can be sufficiently made out that M'Nair had notice that these discounts were for Mathie's separate concern, this may be relevant to bar him *personal exceptione*, or upon the ground of private knowledge. But it may be asked, does he hold these bills for himself or the bank? What if he had indorsed them away to others? As to one partner binding another by bills, see *Harrison v. Jackson Douglas*, p. 356."

LORD JUSTICE CLERK (HOPE).—"I think the defender here is liable. The firm of Hugh Mathie and Co. was assumed, with the knowledge and approbation of Mr. Fleming. The insurances on their cargoes and vessels, effected under the firm of Hugh Mathie and Co. would have been null, if without interest. It makes no difference that the same name is the firm of another. This ought just to have put him more on his guard. It binds him the more, because the public are more liable to be deceived. This was not a joint adventure, but a trade, similar to the Baltic trade, Turkey trade, &c. Suppose it had been a joint adventure under an individual name, *e. g.* Hugh Mathie. A bill under such a name deceives nobody. If the holder of such a bill can find another latent partner liable under that bill so signed, so far good and well; if not, he is not deceived. But a firm induces a belief that others are concerned."

"It might have happened that Nassau was the losing concern, and the other flourishing, the hardship would have been reversed."

LORD BALMUTO.—"I am of opinion that Fleming was not a general partner. The Nassau concern was carried on separately, in different rooms,—different places,—different books."

LORD MEADOWBANK.—"This Company acted as agents for the Nassau concern. The dealers with Mathie were not in *bona fide* to neglect inquiring into the matter. It was their duty to inquire."

LORD CRAIG.—"I think Fleming is liable. He trusted Hugh Mathie to use the firm. The burden of inquiring did not lie on M'Nair. This would make every case of the kind a particular case."

1812.

 FLEMING
 v.
 M'NAIR.

while, on the other hand, he is not liable for the other five bills, amounting to £3999, which forms the subject of the next appeal brought by Mr. M'Nair. The ground of the distinction taken was this, that in February 1803 the respondent wrote Mathie to know who were his partners, that he might know upon whose credit he advanced money, and from the evidence it appeared that the respondent was then made aware of who these partners were. The three bills for £1000 were discounted prior to that date; but the five bills for £3999 were discounted subsequent to that date, so that the Court held as to them that the respondent could not have discounted these bills under the belief that Mr. Fleming was a partner.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. The respondent has pleaded all along that the appellant was a partner with Hugh Mathie and Co. in their general business; but the Judges of the Court below rested their decision upon the principle, that though the appellant was not a partner of Hugh Mathie and Co. in their general business, yet as he was a partner with them in an adventure of some importance, and retired their bills connected with that adventure, after the bankruptcy of Hugh Mathie and Co., the respondent, Mr. M'Nair, might have supposed that the appellant was a partner in Hugh Mathie and Co. in their general affairs; and having trusted to the credit of the appellant on reasonable grounds, he was entitled, in equity, to require the appellant to guarantee the whole debts of Hugh Mathie and Co., but the respondent does not so narrow his case, for he contends that the appellant was a general partner of Hugh Mathie and Co. The answers which he has to make to this demand are, 1st, That he received no value in any form for the bills charged on; 2d, And by the practice of merchants, it is not understood that an individual, by taking a share in a particular adventure or speculation, along with a commercial

Suppose the bills had been discounted in Glasgow or Edinburgh. The case of Forrester and Bannatyne is decisive. An agent for a bank cannot put such questions; and perhaps if he did, may not receive a true answer. Must still trust to the bill itself."

LORD METHVEN.—"I am of the same opinion. Merchants ought to carry on their trade more correctly. We cannot go upon careless practices; and I am therefore for refusing the bill."

"All the Judges, except three, held, that Fleming was liable."

company, and allowing that company to manage the adventure, becomes thereby liable to pay the whole debts of the company arising out of their general trade, with which he has no concern. 3d, The appellant never consented to pay the bills in question, nor did he directly or indirectly hold himself out to the public as a person liable to pay the debts of Hugh Mathie and Co. in their general trade. Even Hugh Mathie and Co. did not attempt to support their credit by the name of the appellant, and did not understand that they had power to bind him in matters unconnected with the adventure to Nassau, to which the bills now under consideration bear no relation. The appellant cannot be bound for money which neither he himself, nor any party in his name, did directly or indirectly engage that he should pay. 4th, No positive law declares, that bills or other obligations, granted by a commercial company in their own affairs, shall bind strangers, who have merely taken a share with them in a special trading adventure, such a law would be contrary to equity, would greatly embarrass commercial transactions, and accordingly it has received no countenance in the practice of the courts of justice. 5th, The Bank of Scotland, who, through their agent, are respondents in this case, are a permanent incorporation. Their former agent, Alexander Dunlop, knew that the appellant was not a partner, or member of the firm of Hugh Mathie and Co., and, like the principal merchants of Greenock, considered the appellant as liable only for the engagements of Hugh Mathie and Co. relative to the Nassau concern. The knowledge of an agent must be held equivalent to knowledge by his constituent; and the Bank of Scotland, which is a permanent body, though consisting of fluctuating members, cannot be permitted to say, that by changing its agent, it was ignorant of the matter. 6th, The inquiries made by the respondent concerning the partners of the firm of Hugh Mathie and Co. demonstrate that the respondent did at no period, in discounting bills for Hugh Mathie and Co., rely upon the credit of the appellant. 7th, Supposing, however, that the respondent did, previous to 1803, *believe* the *appellant* to be a partner in general business with Hugh Mathie and Co., and consider himself, on account of that *belief*, as entitled to recourse against the appellant for payment of all obligations granted by Hugh Mathie and Co., it is very clear that on discovering his error, it became the duty of the respondent to have immediately informed the appellant of the principle on which he meant to act; and till the appellant could have

1812.

FLEMING
v.
M'NAIR.

1812. an opportunity of taking measures for his own security, Mr. M'Nair ought to have given out of his hands no money belonging to Mathie and Co. Had Mr. M'Nair done so, the appellant could have operated relief, 1st, By demanding security from Hugh Mathie and Co., who were in good credit at the time; or, 2d, By arresting in the hands of Mr. M'Nair the funds of Hugh Mathie and Co.

FLEMING
v.
M'NAIR.

Pleaded for the Respondent.—It is fully established by evidence that the appellant was a partner with Hugh Mathie and Co. in a mercantile business, carried on from the year 1799 to 1803, under the firm of Hugh Mathie and Co.; and the bills in question being accepted or indorsed by the acting partner of that firm in the name of that company, the appellant becomes thereby, as another partner, liable for the payment of negotiable instruments, to which the name of his firm of dealing has been legally affixed, and his credit thereby pledged. 2. Even if it had appeared, which by no means is the case, that Hugh Mathie carried on other business, in which the appellant had no concern, under the firm of Hugh Mathie and Company, that would not remove his liability. The respondent is an innocent holder of these bills, and gave a valuable consideration for them. It is not proved whether he knew that such a distinction did exist; and it is not so much as pretended that he was informed that the bills were not negotiated on behalf of that firm of which the appellant was a co-partner, or that the proceeds were not to be carried to their account. But, to use the words of the late Lord Chief Justice of England, (Lord Kenyon), in a case altogether similar to the present, the appellant is nevertheless liable; "he had traded under that firm, and persons taking bills under it, though without his knowledge, had a right to look to him for payment."

Barker and
Others v.
Charlton,
Peake's Ni.
Pri. Cases, p.
80.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed; but without prejudice to any question which the appellant may be advised to raise, respecting the effect of any act of the respondent under any sequestration against any other person or persons.*

* This had reference to the possible case of M'Nair ranking, or having ranked and claimed as against the estate of Hugh Mathie and Company, which, if he did, according to the doctrine of Election in England, he could not also claim against the other concern, in which Fleming was a partner, and therefore he would be free.

rights belonging to us, of disposing on deathbed of what me may have acquired in life, should be taken from us, because the palsied hand may then refuse to do its office. There are fair objections to the evidence of some of the servants on the score of interest; but I see this matter of the Duke's subscription explained by one of the servants, joined to an affecting circumstance of his attachment to his master. He states that part of the subscription was done without spectacles, and that the Duke then called for his spectacles, and that Mr. Winter put them on.

"With regard to the other circumstances, it appears that when the Duke set about making a will, Mr. Dundas put questions, and got answers, and thus received the proper instructions.

"We are not to ask if there be more or less of delicacy in what occurred in suggesting the name of a friend of the Duke on this occasion. But to this suggestion, the Duke said no, 'he is a worthy man, but I never intended to leave him any part of my fortune. Let Mr. Charles Baillie have a half instead of a fourth.' It is impossible for us to allow ourselves to consider if there was delicacy in this suggestion or not.

"Mr. Dundas is a person totally unknown to me. All the judges in Scotland speak of him as a man of high honour and character; and this was admitted by the appellant's counsel at the bar.

"Allow me to say that protection is due from your Lordships to a man of honour and character situated as Mr. Dundas was.

"He did not set himself forward to make this will; but he was sent for from Scotland on purpose to come to town to make the will. This was done by Sir Lucas Pepys. Accordingly, he comes to town, and he finds that the opinion of the medical people is, that the Duke was not competent to make a will; and Mr. Dundas was of the same opinion, and, according to the physicians, repeatedly (told so.)

"He was thus placed in a situation of great difficulty and delicacy. If he should find the Duke capable of making a will, and if he does thereupon act with firmness, he must foresee that his own character was at stake, and liable to be pulled to pieces by minute observations on all that should occur.

"What did Mr. Dundas do then? There appears to have been a sort of expostulation between him and Sir Lucas Pepys, as to the propriety or impropriety of making a will. Mr. Dundas says, 'He need not be afraid, as he would do nothing improper; but if the Duke gave correct instructions, he would execute them.'

"Then it appears from the evidence of him and Mr. Coutts Trotter, that the instructions were given at two different intervals, and the witnesses were Mr. Coutts Trotter, Mr. Winter, and one of the servants. These witnesses all gave evidence to the Duke's capacity; Mr. Coutts Trotter swears, That he would have paid money on the Duke's draft at that time.

"But it is said, we have the evidence of the physicians strongly on

1812.

 KEE, &C.
 W. WAUCHOPE,
 &C.

1812.
 ———
 KER, &c.
 v.
 WAUCHOPE,
 &c.

the other side. I can see no inconsistency in their evidence with that given by Mr. Dundas. As to Winter, I should have great difficulty in allowing him, in a Court of law, to blow away the evidence arising from his attestation, as an instrumentary witness, of the Duke's sanity at the time.

"Dr. Reynolds says no more than this, that the Duke was in a comatose state when he saw him; but he says, in express words, that he thinks the Duke's sanity must depend upon the evidence of those who were present when the will was executed. Thus he does not undertake to say, that the Duke was not capable to make a will.

"As to Sir Lucas Pepys, he was of opinion that the Duke was not likely to be able to execute a will; he cautioned Mr. Winter and Mr. Dundas against the execution of any will; but the will, notwithstanding, was prepared by Mr. Dundas, and witnessed by Winter.

"Then we have Mr. Winter's letter to Sir Lucas on the morning after, mentioning that the Duke had executed a will; he notices the difficulty as to the signature, that it was badly done, but 'he hopes 'it will do.' We have also Mr. Winter's letter to Sir G. Douglas, about a fortnight afterwards, in which he mentions that the Duke was quite collected.

"Then we see that Sir Lucas accepts a legacy under that will. There is some evidence of his having thought of the Duke's *Delphin Classics*;* but I know Sir Lucas Pepys very well, and am satisfied

* The *Delphin Classics* here alluded to by Lord Eldon, as having been prized by Sir Lucas Pepys, were esteemed of great value; and, at the sale of the Duke's Library, so much celebrated for its having contained the most select and valuable collection ever offered for public sale in England, they were keenly competed for, and bought by the Duke of Norfolk at the price of £500. They were the first edition of the work, bound in a magnificent style, as for the French king's library, and might well have formed the nucleus of a second Pepysian library. At the same sale, there was a book which, if not of more transcendent worth, at least brought a higher price than the *Classics*. This was the celebrated unique copy of the *Decameron* of Boccaccio, which was knocked down to the Marquis of Blandford, eldest son of the Duke of Marlborough, at the large sum of £2260, the then Lord Althorpe being the bidder against him. It is said by a friend (Mr. Robertson) who was present, that Lord Althorpe, after having gone as far as prudence would dictate in the competition, stopped short, exclaiming to his brother near him, "What would our grandmother say 'to this?'" The wholesome respect in which he held that lady operated fortunately in this instance; for the *Decameron* was sometime afterwards sold a second time, apparently under disadvantageous circumstances. At this sale it was bought by Messrs. Longman and Co. at nine hundred guineas, for Lord Spencer, and it now forms a part of the Althorpe Library, now one of the noblest in England.—Vide Dr. Dibdin's "*Ædes Althorpiæ*," with account of the Althorpe Library.

The first Duke of Roxburghe had bought the *Decameron* for £100.

For the Appellant, *Wm. Adams, Sir Samuel Romilly,* 1812.
John Clerk.

For the Respondent, *Tho. Plumer, M. Nolan.*

M'NAIR
 V.
 FLEMING.

NOTE.—This case is not reported in the Court of Session. Professor Bell, in his Commentaries, vol. ii. p. 670, refers to the case, and states that Sir Samuel Romilly, who was counsel in it, afterwards gave an opinion in a subsequent case, in which he gives, what he understood to be the grounds of the above judgment in the House of Lords, thus: “ The question was, who became the debtor of Mr. M'Nair by the signature of Hugh Mathie and Company to the bills? The House of Lords was, as I understood that decision, of opinion that where several partnerships, consisting of different individuals, carry on business under the same firm, and enter into negotiable securities under the same signature, the holder of such securities has a right to select which of these partnerships he chooses for his debtors. But it never, as I conceive, entered into the minds of any of the Lords, that he could take all the partnerships as debtors. The signature of H. Mathie and Co. being equivocal, and being sometimes used for *Mathie, Parker, and Jameson*, and sometimes used for *Mathie, Fleming, and Home* (Howie), the Court was finally of opinion that the *holder of the bills* had an option to say, which of those partnerships he would understand to be meant. The Lord Chancellor Eldon, during the argument, expressed great doubts even upon this point, and a very strong inclination of opinion against it; and said he believed that there was no authority for such a decision but a *Nisi Prius* case before Lord Kenyon, which was cited to him in the course of the argument. And his Lordship, in the strongest terms, stated that it was impossible that both partnerships should be the debtors. There never was a partnership of *Mathie, Parker, Jameson and Home* (Howie), those five persons, therefore, never could all become bound by the signature of Hugh Mathie and Company.”

JOHN M'NAIR, Agent for the Bank of Scot- }
 land in Greenock, } *Appellant* ;
 ARCHIBALD FLEMING, Merchant in Greenock, *Respondent*.

House of Lords, 12th July 1812.

PARTNERSHIP—LIABILITY AS PARTNER.—Held, in the circumstances of the previous case, that after the bank agent wrote Hugh Mathie to know who were his partners, so that he might know on whose credit he discounted the bills, he must be presumed to have received in answer correct information on the subject, and that after *that* he could no longer act in the belief that Mr. Flem-

1812.

M'NAIR
v.
FLEMING.

ing was a partner in the general business of Hugh Mathie and Company, and therefore that he was not liable for the bills.

In the preceding appeal the circumstances of this case are detailed. The question with reference to five of the eight bills in the hands of Mr. M'Nair, was separately tried. These bills amounted to £3999. In addition to the facts already set forth, it was stated by the appellant, that the insurances for goods belonging to the Nassau concern were effected by the respondent, under the firm of Hugh Mathie and Co. Bills of exchange drawn by the agent of the store at Nassau were drawn upon Hugh Mathie and Co. The bills of exchange for the business of the trade, and the invoices for the goods furnished to the concern, as well as the policies of insurance of such goods, were all in the name of Hugh Mathie and Co. Fleming contended, that as it was proved Mr. M'Nair wrote for information from Hugh Mathie early in the month of February 1803, to know who his partners were, and which information, it was maintained, he must be presumed to have received at that time, these five bills, which were discounted with him subsequent thereto, could not be a claim against the respondent, as Mr. M'Nair, after that information, could no longer *act* under the *belief* that Mr. Fleming was a partner in the general business of Hugh Mathie and Company,

These bills were as follows:—

1. Hugh Mathie and Co.'s promissory note to William Mathie and Archibald M'Guffie, discounted 5th March 1803,	£1500	0	0
2. Caleb Blanchard's acceptance to Hugh Mathie, discounted 10th Feb.	1490	0	0
3. Hugh Mathie and Co.'s acceptance to Wm. Mathie, dated 22d February	476	0	0
4. Buchanan and Lyle's acceptance to Hugh Craig, discounted 8th March	246	10	3
5. Wm. Shirra's acceptance to do., discounted 18th March	287	0	0
	<hr/> £3999 10 3		

There were other objections applicable to the bills themselves. 1. The £1500 bill had been originally drawn as the promissory note of Hugh Mathie, but the pronoun "I" had been erased, and in place of it had been substituted the pronoun "We," and after the signature of Hugh Mathie had been added the words "& Co." 2. The bill for £1490 was payable to Hugh Mathie as an individual, and was indorsed by Hugh Mathie, and also by Hugh Mathie and Co. It

therefore appeared.that this last indorsation went merely to pledge the name of Hugh Mathie and Co. for a debt of Hugh Mathie as an individual. 3. In regard to Shirra's acceptance for £287, the appellant could, if he had chosen, operated relief out of large funds of Shirra's in his hands at Shirra's bankruptcy. Since Shirra's bankruptcy he had received several payments from Shirra's friends to account of the several bills held by him. That if the appellant applied these payments to the several bills *pro rata*, the effect would have been to extinguish the debt. 4. To the bill of £246. 10s. 3d. the same objection applied.

1812.

M'NAIR
v.
FLEMING.

The Lord Ordinary, after a proof was led, pronounced June 3, 1806. this interlocutor: " Finds that it is admitted by Mr. M'Nair " that about the beginning of February 1803 he thought it " prudent to write a letter to Hugh Mathie to desire to " know who were the partners of Hugh Mathie and Co. " Finds it proven that Mr. Mathie was frequently in Mr. " M'Nair's office, and in his company there, after the receipt " of that letter, and before the bills in question were dis- " counted: Finds that Mr. M'Nair avers, that at these " meetings Mr. Mathie did not give him, nor did he ask an " explanation about his partners: Finds that Mr. M'Nair " ought not to have rested on such silence; and that after " writing that letter, he was not in *bona fide* to discount any " bills on the credit of the persons whom he had previously " *supposed* and *believed* to be partners of Hugh Mathie and " Co.; but ought to have stopped all discounts and other " transactions with Hugh Mathie in the name of that com- " pany: Finds, that having come to the resolution of re- " quiring satisfaction on that head, he ought to have writ- " ten to Mr. Fleming, as even the assertions of Mathie in " his own favour ought not to have been taken as evidence " of the partnership, after doubts were entertained: Finds " it unnecessary *in hoc statu* to determine the other points " of the cause; and, on the above grounds, suspend the " letters *simpliciter* and *decerns*." On representation the Lord Ordinary adhered; and on two reclaiming petitions to the Court, the Court adhered.

June 16, 1806.
Jan. 16, and
Feb. 5, 1807.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The grounds upon which the respondent is liable for the payment of the bills which form the subject of this appeal, are the same with those upon which the Court of Session has found the respondent liable

1812. for the bills which form the subject of his appeal in the previous case against the appellant; and there is nothing in the specialties which he has attempted to raise that can free him from his liability.

FRAZER
v.
SPALDING, &c.

Pleaded for the Respondent.—It is perfectly clear that the appellant can have no claim on the respondent for payment of the bills amounting to £3999, because, at the date on which he discounted, or advanced money on them to Hugh Mathie and Co., being posterior to the middle of February 1803, he knew the respondent was not a partner of Hugh Mathie and Co., and, consequently, could not be liable in obligations or bills granted by that company in matters with which he had no concern.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Tho. Plumer, M. Nolan.*

For the Respondent, *Wm. Adam, Sir Samuel Romilly,*
John Clerk.

NOTE.—Unreported in the Court of Session.

(Fac. Coll. vol. xiii. p. 403, et Mor. App. 1. "Heir and Executor.")

JOHN FRAZER of Farraline, who and his Father, the deceased SIMON FRAZER of Farraline, were the Trustees under the deed of Settlement of Miss FALLS, } *Appellant;*

JOHN SPALDING, Esq., surviving Executor of the Will of the deceased Lieut.-Colonel HUGH FRAZER of Knockie, and JAMES BRISTO FRAZER, Factor *loco absentis*, appointed by the Court of Session over the Estate of his late Father, the deceased JAMES FRAZER of Gorthlic, Esq., another Executor, and Residuary Legatee under the Colonel's Will, } *Respondents.*

House of Lords, 20th July 1812.

HERITABLE DEBT—PAYMENT OF—HEIR OR EXECUTOR—RELIEF—FOREIGN—DOMICILE.—(1.) A testator by his will, executed in London,

conveyed his heritable estate in Scotland to his heir at law. He next conveyed his moveable estate to executors, for the purpose of paying certain legacies, and also his debts, and the residue to his uncle. There were no debts owing by him, except an heritable bond for £2000, over the heritable estate in Scotland. It was contended by the heir at law, that the executors were, by the intention and words of the will, taken bound to pay the heritable debt. In an action of relief, held, that the words of the will, conceived in general terms, did not exempt the heir or disponee in the heritable estate from paying the heritable debt due upon it. (2.) The testator had left Scotland early in life, and was constantly abroad with his regiment on foreign service. He never returned to Scotland, except for a short time with his regiment. He afterwards died in London, where he made his will. Held, That the heritable bond above mentioned, was not a burden on the personal estate, according to the law of England, but was to be judged of according to the law of Scotland, where the heritable estate was, and to be paid by the heir taking the heritable estate on which it was an incumbrance.

1812.
FRAZER
v.
SPALDING, &c.

Colonel Frazer inherited from his father a small estate called Knockie, yielding then about £30 per annum. His father dying while the Colonel was a boy, he was brought up by his uncle, James Frazer of Gorthlic. Having a fancy for the army, his uncle procured him a commission, and he went to India as a lieutenant in the 72nd Regiment, and afterwards became lieutenant-colonel of the regiment.

At a time when there was a prospect of there being a vacancy in the majority of the regiment, he wrote to his uncle, expressing a desire to purchase it. His uncle procured a loan of £2000 from Miss Falls; and as his own estate was inadequate as a security, Mr. Frazer not only became bound in the bond, conjunctly and severally, but conveyed, in farther security, his own estate of Torbeg, in addition to the Knockie estate. In this way the money was got, and his object accomplished.

Colonel Frazer afterwards acquired a fortune in India of £15,000, chiefly through prize money claims. He came home with his regiment to Great Britain, visited his estate of Knockie, which by this time had improved in value, and he then expended about £2000 on the improvement of the mansion-house and grounds. He died in London in April 1801, having executed there a will, disposing of his heritable and moveable estate. Had no will been made, the appellant's father, Simon Frazer, and, after his death, the appellant, would have succeeded to his heritable estate as heir at law.

1812. In this settlement, he therefore conveyed it, in the following terms:—"I do, by these presents, give, assign, convey, and
 ——— FRAZER "dispone my lands and estates of Knockie and Dalchapple,
 v. "with their appurtenances, and all others my lands and real
 SPALDING, &c. "estates, of every nature and kind soever, and wheresoever
 "situated in Scotland, to, and in favour of my cousin,
 "Simon Frazer of Farraline, and his heirs, assignees; and
 "I bind and oblige myself and my heirs to make up titles
 "to such lands and estate; and when so made up, to con-
 "vey the same, by proper instruments, agreeable to the laws
 "of Scotland, to them."

He then gave directions to his executors as to his personal estate, and states, "With regard to my personal estate, I
 "give, grant, devise, and bequeath the same in manner fol-
 "lowing, viz. In the first place, I order and direct that my
 "funeral charges and expenses, *together with all my just*
 "*and lawful debts, be paid by my executors* named, as soon
 "after my decease as conveniently may be." After be-
 queathing several legacies, he directed, after his whole debts
 (the only debt owing was the £2000), and legacies were
 discharged by the executors, that the residue should be con-
 veyed to his uncle, James Frazer of Gorthlic, one of the re-
 spondents.

It occurred to the appellant, that, unless according to the
 expression of his settlement, "all his debts" was included
 the £2000, that the conveyance to him of the heritable
 estate, which was burdened with that £2000, would be li-
 terally conveying nothing to his father whatever. Accord-
 ingly, as trustees of the Miss Falls, an action was raised by
 the appellant against the respondents for the payment of
 the bond.

Besides special defences, this was met by a counter ac-
 tion of declarator and relief, at the respondents' instance, to
 have it found and declared, that the £2000 bond was a real
 burden over the lands of Knockie and Dalchapple, for which
 the heir and disponent succeeding thereto is alone liable,
 and not the personal estate and effects of the deceased
 Colonel Frazer, and for relief to that extent.

It was argued by the appellant, that unless the debt of
 £2000 fell to be paid by the executors exclusively out of the
 personal estate, the disposition of the lands to the appellant's
 father would be merely nugatory; that there was every rea-
 son to suppose that he meant to give Mr. Frazer of Farr-
 aline a succession of some value; but unless the bond was
 paid out of the personal estate, Mr. Frazer would take no-
 thing, or next to nothing. And, finally, as the Colonel, &c.

the time of his death, and for a great many years before, was a domiciled Englishman, and his will made in England, and the most part of his estate there, the testament ought to be construed and to be executed according to the law of England, which lays the burden of the payment of heritable bonds and mortgages on the executors and the personal estate. It was answered, that the rule of law was, that the heir takes the heritable property, under the burden of the heritable debts, and the executors the personal property, under burden of the personal debts, unless the deceased declare in his will to the contrary. In the deceased's settlement there is no declaration contrary to the rule of law, whereby the heir is relieved of the heritable debt, and the payment of it is burdened on the executors; that no regard can be paid to the supposed intention of Colonel Frazer, if not expressed in his will. And, lastly, although he did not reside in Scotland for many years previous to his death, with the exception of the short time his regiment was at Perth, yet he ought to be considered as domiciled in Scotland.

1812.

FRAZER
v.
SPALDING, &c.

The Lord Ordinary pronounced this interlocutor :—"The Lord Ordinary having heard parties procurators, conjoins the process of relief, at the instance of John Spalding and others, the executors of Colonel Hugh Frazer against Simon Frazer of Farraline, with the before mentioned process, at Simon and John Frazer's instance, against Colonel Frazer's executors: Finds the whole defenders conjunctly and severally liable for payment of the heritable bond libelled on; but, in respect the settlement by which the lands of Knockie are disposed to Simon Frazer of Farraline, one of the defenders, could only import a right to those lands, subject to the heritable debt with which they were burdened, and that the clause, taking the executors bound to pay the debts, cannot have the effect of altering the right of relief between *him* and the executors, finds the executors entitled to relief from Simon Frazer of Farraline, Esq., of the heritable bond libelled on, conform to the conclusions of their action of relief, and decerns accordingly."

On reclaiming petitions to the Court, the Court adhered.* Nov. 15, 1804.
July 5, 1805.

* The Court of Session were of opinion, "that, without a special clause in the deed to that effect, the legal rules of accounting between heir and executor could not be altered."—Vide Fac. Coll.

1812.

Against these interlocutors the present appeal was brought to the House of Lords.

FRAZER
v.
SPALDING, &c.

Pleaded for the Appellant.—1. Colonel Frazer, in his settlement, directed his executors to pay his just and lawful debts, which direction necessarily implies that the burden of these debts should ultimately fall on the personal estate. 2. Colonel Frazer left his residuary legatee his whole estate, exclusive of the lands of Knockie and Dalchapple, after payment of various legacies, of the expenses of his funeral, and of his just and lawful debts: therefore, the residuary legatee is entitled to demand the residue only, after payment of those expenses, legacies, and debts, and he has no right, under the will, to insist that the disponent of Knockie and Dalchapple shall relieve him of these debts. The cases, *Lady Cunningham v. Lady Cardross*, (Mor. 12493); and *Denham v. Denham*, 8th March 1765, (M. 5224), support these propositions. 3. It is a mere *questio voluntatis*, whether Colonel Frazer's heir, or his executors, are burdened with his debts; but the circumstances in which Colonel Frazer was placed, the state of his fortune, and the general scope of his settlement, all concur with the clear unequivocal form of expression which he has used, to show that he intended his executors should be ultimately liable. 4. The will was made and executed in England, where Colonel Frazer was also then domiciled, by the law of which country the heir has a right in equity to have his ancestor's debt paid out of his personal estate. If, therefore, the executors had been sued upon the bond in England, they could not have recovered as against the heir, if the real estate had been situated in England, even though there had been no such direction as that given by the will, which thus derives additional support from the laws of the country where it was executed, and the testator was domiciled. 5. Granting that the executors are entitled to relief from the heir, the action at the instance of Miss Falls' trustees ought not to have been conjoined with the action of relief at the instance of Colonel Frazer's executors, and the appellant ought not to have been found liable in payment of the heritable bond.

Pleaded for the Respondents.—1. If it were made a matter of proof, it would be easy to establish, if that were necessary to the issue of this cause, that Colonel Frazer meant that the heritable debt should not be a charge on the personal estate, but had determined that it should remain a burden on the lands. If it were competent to resort

to the evidence of Mr. Spottiswoode, and to Mr. Frazer, the gentlemen who drew out the settlement, it would be proved that these gentlemen made him aware that, as a matter of course, Simon Frazer would take the estate burdened with the heritable debt, unless, by an express clause, the estate was exempted from that burden. 2. Clauses in settlements burdening grantees with the payment of the testator's debts, in general terms, are construed as being merely for the benefit of the testator's creditors, and have no effect whatever in questions of relief between heir and executor, or between the different heirs or disponees, each of whom is primarily liable for the debts that are the proper burdens upon the estate, which he takes under the settlement, and which the law considers as his proper debts. Though a testator has it in his power, by proper clauses in his settlements, to burden any particular donee or grantee with the whole of his debts, so as to lay him under an obligation to relieve the other donees or grantees of such debts; yet, in the present case, the testator has put no such clauses into his settlements, and has indicated no intention that his successors in the moveable estate should relieve his heir or donee in the heritable estate. And the general clause founded on indicates no such intention, and can have no such effect. The donee in the heritable estate must therefore pay the debt, with which that estate stands burdened, upon the principle *res transit cum onere*. This has been settled by several decisions, which have received the final judgment of the House of Lords, viz. *Rose v. Rose*, 17th January 1786, (Mor 5229, House of Lords, 2nd April 1787; ante vol. iii. p. 66); *Drummond v. Drummond*, 17th May 1798, (Mor. 4478, House of Lords, 20th February 1799; ante vol. iv. p. 66.) 3. The question here being one in regard to real estate in Scotland, the same must be judged and governed by the laws of that country; and the circumstance of Colonel Frazer having died in England, and of having his personal property situated in that country, or in other countries where the law of England prevails, cannot affect or interfere with the succession to his real estate; and as land cannot, like moveable property, be transferred from one country to another at the pleasure of the proprietor, it must necessarily be subject to the rules and regulations of the jurisdiction within which it is situated; the rule, therefore, of the law of England cannot apply, that mortgages are a burden on the personal estate. Even if that rule did apply

1812.

FRAZER
v.

SPALDING, &c.

1812. when followed out in the courts of England, the executors would still have relief against the real estate, as was found in Drummond's case. No doubt, in England, these heritable debts are charges on the personal estate; but the law is contrary in Scotland; yet, in some respects, it is similar. In England, a similar rule prevails to what prevails in Scotland, namely, that the personal estate is liable to pay heritable bonds or mortgages, unless the testator has exempted that estate from liability, and put the burden of payment expressly on the real estate; and Mr. Cruise, in his Digest, says, "Where a testator charges his lands with the payment of his debts, this will not exonerate his personal estate, for such a charge can only be intended for the purpose of creating an additional fund, in case the personal estate should not be sufficient." In *Bridgeman v. Dove*, Atkyns, vol. iii. p. 201, Lord Hardwicke said, "I know of no authority whereby the words, 'I make my real estate liable to pay my debts,' will exempt the personal estate without any special exemption of such personal estate." Again, Lord Thurlow, in the *Duke of Ancaster v. Mayer*, laid down the following rules: "In the first place, the personal estate is liable, in the first instance, to the payment of the debts; but, in exception to this, it is agreed that the testator may, if he pleases, give his personal estate, as against his heir or any other representative, clear of the payment of his debts; and then it becomes a question, what is the mode of expression to give the personal estate exempt from such payment, when the rule of law is, that such an estate is first liable? Perhaps it might not have been unwise to have adopted the rule of law laid down in *Fereyes v. Robertson, et al.*, that the testator must use express words: but it is impossible to abide by the opinion given in that case consistently with the rules in other cases. The second rule is, that when there is a *declaration plain*, that shall stand in lieu of express words. This rule has been laid down so long, and acted upon so constantly, that if other judges were to put the construction of wills upon other grounds, how well soever it might have been originally, it would be very unwise to make the administration of justice take a course contrary to former rules. Therefore, if there be a *declaration plain*, or manifestation clear, so that it is apparent upon the face of the will that there is such a plain intention, the rule then is, not to disappoint, but to carry such intention into exe-
- FRAZER**
v.
SPALDING, &c.
- Cruise Digest, vol. ii. p. 125.
Also, Roper's Legacies, Ed. 1828, vol. i. c. 12, p. 595.
Atkyns, vol. iii. p. 201.
- 1 Bro. Rep. p. 462.
- Bunbury's Rep. p. 301.

“ cution. But should no such intention manifestly appear, 1812.
 “ there is not a single case which does not take it for grant-
 “ ed that the personal estate is by law the first fund for the
 “ payment of debts.” In a later case, *Watson v. Brick-*
 wood, 9 Vesey, jun., p. 453, the rule, as above laid down by Lord Thurlow, was confirmed and adhered to.

BOSWALL
 v.
 MORRISON.
Watson v.
Brickwood,
9 Vesey, jun.,
p. 453.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed, so far as “ in respect the settlement by which the lands of Knockie are disposed to Simon Frazer of Farraline, one of the defenders, could only import a right to these lands, subject to the heritable debt with which they were burdened, and that the clause, taking the executors bound to pay the debts, cannot have the effect of altering the right of relief between him and the executors: Finds the executors entitled to relief from Simon Frazer of Farraline, Esq., of the heritable bond libelled on, conform to the conclusions of their action of relief, and decern accordingly.” And it is farther ordered, that with this affirmance, the said cause be remitted back to the Court of Session, without prejudice to any application by the appellant to the Court which he may be advised to make, touching the questions whether the processes should have been conjoined, and whether the appellant has been properly called in the action of these executors.

For the Appellant, *Sir Samuel Romilly, M. Nolan, Geo. Cranstoun.*

For the Respondents, *Wm. Adam, John Clerk.*

(Fac. Coll. vol. xiii. p. 544. Mor. App. Damage and Inter. No. I.)

THOMAS BOSWALL, late Merchant in Leith, } *Appellant* ;
 now residing in Edinburgh, . }
 JAMES MORRISON, Merchant in Leith, - *Respondent.*

House of Lords, 20th July 1812.

CONTRACT OF SALE—DAMAGES FOR NON-FULFILMENT.—Action was raised for delivery of four puncheons of spirits, or for damages for

1812.

ROSWALL
v.
MORRISON.

non-fulfilment of the contract of sale. The spirits were purchased in the knowledge, on the buyer's part, that there was to be a rise in the price, and he bought at the old price. The seller was ignorant of this intended rise in the price, and of this information from London, which the buyer possessed. He afterwards refused to deliver: Held him liable in £200 of damages, being the sum concluded for, estimated according to the highest price of whisky that could be got at the time of pronouncing decree in the action.

This was an action raised by the respondent against the appellant, for delivery of four puncheons of spirits, or failing which, for damages for non-fulfilment by him of a contract of sale in regard to these spirits, entered into on 3d October 1799, in the following circumstances: It appeared that on 30th September 1799 an order had been made in the House of Commons for leave to bring in a bill to prohibit for a time the distillation of spirits in Scotland; and the respondent having heard of this early on the morning of the 3d of October, and perceiving that the effect would be to raise very materially the price of spirits, he resolved to purchase up as much spirits as he could at the old price, before information of the Government order became generally known. Accordingly he called on the appellant, and concluded a bargain for four puncheons, to be delivered to him at the rate of 5s. 4d. per gallon. After hearing of the news from London, which reached the same day, after the sale was effected, the appellant refused to deliver the spirits at the price agreed on, (the price having risen to 16s. per gallon), stating that he had been tricked and deceived in the matter, whereupon the present action was raised.

After a special interlocutor, stating the facts, the Lord Jan. 22, 1803. Ordinary found the appellant liable in the sum of £200 damages for non-delivery of the spirits, the loss being estimated as equal to the sum of £200, concluded for in the libel on 1st November 1799, the date of citation to this action.

On reclaiming petitions to the Court varying interlocutors * were pronounced. At last the Court pronounced this Jan. 25, 1805. interlocutor: "The Lords having resumed consideration of "this petition, and advised the same, with the answers "thereto, alter the interlocutor complained of, and in terms "of the previous interlocutor of the Lord Ordinary, modify

* The variation in the interlocutors of Court was upon the amount of damages, and the rule for estimating that amount.

" the damages to £200 Sterling, and decern for payment thereof to the pursuer, with interest from the 1st Nov. 1812.
 " 1799: Find expenses due from the date of the interlocutor BOSWALL
 " of the Court of the 24th Feb. 1802."* Thereafter, on re- v.
 claiming petition, the Court adhered. And their Lordships, MORRISON.
 upon advising the account of expenses, with the auditor's Mar. 4, 1806.
 report, modified the account to £101. 14s. 2d., and de-
 cerned. Mar. 12, 1806.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The appellant maintains that the bargain into which he was betrayed, on the morning of the 3d October 1799, was of the nature of a catching bargain, and that it is not obligatory in law. The fact, as uniformly averred by him, has already been stated. On the forenoon of that day, several hours after the mail coach had passed through Leith, and after part of several of the English letters and newspapers had been delivered, Morrison came to the appellant's wareroom, and, under pretence that his stock of spirits was reduced, prevailed on the appellant to sell him four puncheons of whisky at 5s. 4d. per gallon, assuring the seller at the same time that he had no information of any probable rise in the price of the article. At the time this declaration was made, Morrison's stock was not reduced, and he was aware that an event had taken place in the House of Commons, of which the unavoidable consequence was, an immediate rise in the price of Scotch spirits. 2d. But, if this contract, in these circumstances, stands as binding, the appellant ought not to be subjected to the payment of £200 of damages. He is unable to discover on what grounds the Court has proceeded in giving that precise

* Opinions of the Judges:—

It was held by the Court: " 1st, That the buyer's demand was
 " not to be limited to the price at the stipulated day of delivery.
 " 2d. That although the non-delivery be imputable to no fault, the
 " buyer must be indemnified for his actual loss. 3d. That the price
 " at the day of citation was not to be taken as the criterion, since
 " the call to fulfil his engagement would thus discharge the seller
 " from the bad consequences of his subsequent refusal. And, 4th.
 " That it was not practicable, without throwing the matter entirely
 " loose, to enter into the consideration of the probable time at which,
 " had the delivery been duly made, the article would have been dis-
 " posed of."—Bell's Com. vol. i. p. 450.

1812.

BOSWALL
v.
MORRISON.

sum. It cannot be because that sum is the amount concluded for in the summons, for summonses of damages generally conclude for a random sum, considerably higher than is awarded. No doubt spirits rose 3s. a gallon, but the Lord Ordinary has estimated the damages at £200, a sum equal to a rise of 10s. per gallon on the price agreed to be paid, supposing the four puncheons to contain 400 gallons; but this is not a just reason or rule for assessing the damages. Other rules more equitable for adjusting these ought to obtain, such as the market price at delivery, or at raising the action, for, until these events, he was not culpable nor contumacious.

Pleaded for the Respondent.—The facts above stated are not established by evidence; and even if they were admitted, they would not be relevant, inasmuch as it was competent, and perfectly legitimate for the respondent to avail himself of his superior information, in order to make the best bargain he could—a course which is well recognized in mercantile dealings. 2. The appellant contends that the amount of damages ought to have been estimated according to the selling price, when delivery ought to have been made, or from the date of raising the action; but if the first rule obtained, then no seller of spirits could fulfil his bargain in a rising market; and the second rule cannot regulate the amount of damages, because the date of an action is arbitrary. But it humbly appears that the soundest rule for regulating an assessment of damages, in a case of this sort, is to hold, according to the principle of the civil law, that the party committing the breach of contract is liable, according to the profits the purchaser would have gained if the contract had been implemented at any time during the contumacy of the culpable party. At all events, the decree of the Court of Session must remain effectual, which awards less than the highest profits that could have arisen to the respondent if the contract had been implemented.

After hearing counsel,

LORD CHANCELLOR ELDON said,

“ My Lords,

“ In this appeal, there are two questions: 1st, Whether the appellant was liable to an action of damages at the instance of the respondent or not? as to which I never had the least doubt.

“ 2d. Whether these damages had been properly estimated or not?

“ It does not appear to me that, with regard to the second ques-

tion, your Lordships should make any alteration in this judgment of the Court of Session.

" I therefore move to affirm."

(Nothing was said about costs).

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Wm. Erskine, Fra. Horner.*

For the Respondent, *Robert Forsyth, Hen. Brougham.*

1812.

JOHNSTON
v.
MIDDLETON,
&c.

(1st Action.)

SIR WILLIAM JOHNSTON of Hilton, *Appellant ;*

NATHANIEL MIDDLETON and RICHARD JOHNSON, formerly of Stratford Place, in the County of Middlesex, now of Pall Mall, London, Bankers, and ANDREW MACWHINNIE, their Attorney, *Respondents.*

(2d Action.)

SIR WILLIAM JOHNSTON of Hilton, Bart. *Appellant ;*

Messrs. NOEL, TEMPLAR, and Co., Bankers in London, with concurrence of MIDDLETON and JOHNSON, two of the partners of that Co., and ANDREW MACWHINNIE, their Attorney, *Respondents.*

(3d Action.)

SIR WILLIAM JOHNSTON of Hilton, Bart., *Appellant ;*

Messrs. NOEL, TEMPLAR, and Co., Bankers in London, and the said ANDREW MACWHINNIE, *Respondents.*

House of Lords, 12th Dec. 1812.

ACCOMMODATION BILLS.—Circumstances in which the allegation that part of the debt in the bond was for accommodation bills, granted for the benefit of other parties, was disregarded.

Three actions were raised by the respondents against the appellant, the first on a bond for £16,000, and the second for payment of a balance on their banker's account of the sum of £1977. 3s. 7d., after giving credit for £16,000, and

1812. the third action was for payment of the expenses of the two preceding actions.

THOMSON
v.
THOMSONS, &c. Sir William did not defend these actions in the Court of Session, but allowed decrees to pass, for the purpose of delay, and brought suspensions. These bills of suspensions being refused, on the statements of fact made by the parties, whereby it appeared that Sir William had, in his letters, acknowledged the justness of the debt. Notwithstanding, he brought the present appeal to the House of Lords, contending chiefly that he only owed about £10,000 of the £16,000 bond, and that the difference was made up of bills due by Messrs. Ogilvie, London, to whom he had granted them for *their accommodation*; that Messrs. Ogilvie had discounted them with Templar and Co., and that the latter had given the money for them, in the knowledge that they were accommodation bills, because he had shown Ogilvies' letter to the bankers establishing this fact.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £200 costs.

For the Appellant, *Wm. Adam, Ad. Gillies, James Moncreif.*

For the Respondents, *Sir Sam. Romilly, W. Wingfield.*

NOTE.—Unreported in the Court of Session.

Lieut. THOMAS THOMSON,	<i>Appellant ;</i>
KATHERINE THOMSON, and ELIZABETH THOMSON, Daughters of WILLIAM THOMSON of North Steelend, deceased, and their Husbands and Children, .	} <i>Respondents.</i>

House of Lords, 14th Dec. 1812.

LIFERENT AND FEE.

An action of declarator was brought by the appellant, to have it declared that, under his father's disposition of the estate of Northsteeland, that he (appellant) had vested in him the fee of that estate, and was entitled to sell it. The destination was in the following terms: " To and in favour of the said

“ Thomas Thomson, my son, *in liferent, for his liferent use*
 “ *allenary*, and to his heirs whomsoever to be lawfully pro-
 “ created of his body ; whom failing him and his heirs, viz.
 “ the said Thomas Thomson’s heirs, arriving at majority or
 “ marriage, to the said Catherine and Elizabeth Thomson,
 “ my daughters, *in liferent, for their liferent use only* ; and
 “ to their children procreate, or to be procreate, equally
 “ *among* them in fee, heritably and irredeemably.” The
 Lord Ordinary, Lord Justice Clerk M’Queen (14th Nov.
 1792), held that Thomas Thomson, the son, had only a life-
 rent, the fee being in the daughter’s children, and he there-
 fore sustained the defences, and assoilzied.

1813.

BANK OF
 SCOTLAND, &c.
 v
 WATSON.

The Inner House adhered to this interlocutor, on re-
 claiming petition ; and, on appeal to the House of Lords, the
 appeal was dropped ; but afterwards (February 1806) a new
 appeal was brought, whereupon, and after hearing counsel,
 the judgment of the Court below was affirmed.

For Appellant, *M. Nolan, A. Fletcher.*

For Respondent, *Wm. Adam, Mat. Ross.*

NOTE.—This case appears reported in Dow, (vol. i. p. 417), under
 an erroneous date, (14th Dec. 1813.)

(Fac. Coll. vol. xiii. p. 550 : et Dow, vol. i. p. 40.)

The GOVERNOR and COMPANY of the Bank }
 of Scotland, and ROBERT FORRESTER, } *Appellants ;*
 their Treasurer, }
 JAMES WATSON, Baker in Brechin, *Respondent.*

House of Lords, 26th March 1813.

BANK AGENT—LIABILITY—DEPOSIT RECEIPT—STAMP.—(1). Messrs.
 Smith and Sons were agents in Brechin for the Bank of Scotland.
 It turned out that they also carried on business as bankers on their
 own private account. A deposit of money was lodged with them, and
 a deposit-receipt obtained, signed by them, not as agents for the
 bank, but in their own name. Held, on their failure, that the
 principal bank, for which they acted as agents, was liable for pay-
 ment. Reversed in the House of Lords. (2.) Also held it unneces-
 sary to decide the point as to the document or deposit-receipt
 wanting a stamp.

James Smith and Sons were the appointed agents of the
 Bank of Scotland in Brechin, carrying on at same time, on

1813.
 BANK OF
 SCOTLAND, &c.
 v.
 WATSON.

their own account, within the same premises, their own trade, as dealers in linen and flax. They became bankrupt in 1803, with the respondent's money in their hands, whereupon he raised action against the appellants, alleging *that the deposits were made with Smith and Sons in the character of their bank agents*, and, on the principle that the principals are bound by the obligations of their bank agents in the country, concluded for payment of the sums deposited.

The appellants having discovered, on examining into Smith and Son's bank affairs, that they had carried on the business of *private bankers*, by taking in money of people who chose to lodge it with them, returnable on demand, with interest at three or four per cent.; and as there were a great many deposits in the same way, the appellants were obliged to treat the question as one of serious moment, to prevent other like claims from being made.

The deposit receipt was in the following terms:—

“ £60. *Bank Office, Brechin, 25th March 1803.*

“ Received from Mr. James Watson, Brechin, Sixty
 “ pounds, at his credit, bearing interest at the rate of three
 “ per cent. on demand, or four per cent. if not retired in
 “ six months.

“ JAMES SMITH & SONS.”

In these circumstances, the appellants stated the following defences:—

1. That the document on which the demand rested was, by several statutes imposing the stamp duties, inadmissible in evidence in any court of law.

2. That even supposing it admissible, it did not purport to be a voucher or obligation granted by the Bank of Scotland, or by the subscribers as the agents of the bank; but had evidently been given and taken as the voucher for a loan made to Smith and Sons in their separate and private capacity.

3. That no evidence was offered, or could be given, of the money being applied to the use of the bank.

4. That Smith and Sons were limited agents, having power to transact business for the bank, in a form certain, prescribed, and well known, and particularly they had no power to take up money in this way, or to bind the bank by such a document as that produced, and, therefore, even granting that the respondent Watson believed that he was

transacting with the bank through their agents, which was very improbable, or that he was deceived by Smith and Sons, of which there was no evidence, he had himself to blame, and could not have recourse on the bank.

The Lord Ordinary reported the case to the Court. At first, the Court of Session sustained these defences, but, on May 30, 1805. further reclaiming petition, the Court pronounced this interlocutor: "Having resumed consideration of this petition, and advised the same, with answers thereto, and minutes for the parties, and whole process, they alter the interlocutor reclaimed against, and decern against the defenders for payment of the principal sum and interest, in terms of the libel. Also find them liable to the pursuer in expenses, and ordain an account thereof to be given into Court."*

1813.

BANK OF
SCOTLAND, &c.
v.
WATSON.

May 15, 1806.

* Opinions of the Judges:—

LORD PRESIDENT CAMPBELL said,—“The question here is, whether the bank is liable for the money received at the bank office, upon receipt signed by the agents of the bank, not bearing expressly to be for the bank.

“This is a very important question. In general, the bank must be liable for all transactions at their known office, which relate to the common business of banking. Lodging money upon receipts at three or four per cent. interest, is of that nature. The bank is answerable to the public for the conduct of its servants in the operations of banking transacted at their office. Suppose one goes to a bank to purchase a bill on London, pays his money to a clerk, or other officer, standing at the table, and gets a false bill, has he no redress against the bank? or, Will the bank be entitled to say, look at our regulations, and our placards, and you will see, that this man had no right to receive money for us? The present case is the same. The bank must take care to employ honest people, or stand to the consequences. The plea of the defenders, in my opinion, resolves into a gross fraud against the public. In the case of the Bank of Paisley v. Yelton and Mill, &c., 28th February, and 20th June 1798, the bank was found liable for the frauds of their agent. Payments and remittances were made there to account of bills discounted, which Binnie, the agent, should have marked on the bills, or entered in the books of the bank, but failed to do so, and applied them to his own uses. The placards and regulations of the bank were referred to. This was sustained by the Ordinary, but altered by the Court, and the bank found responsible. This is not a common case of mandate, but an *institoria actio*. An agent of a bank is *præpositus negotiis* of his constituents in all matters relative to banking.”

Unreported.

1813.
 BANK OF
 SCOTLAND, & CO.
 v.
 WATSON.
 31 Geo. III.
 § 25.
 37 Geo. III.
 c. 136.
 44 Geo. III.
 c. 98.

Against this interlocutor the present appeal was brought by the defenders to the House of Lords.

Pleaded for the Appellants.—1. By the several statutes imposing the stamp duties, the document founded on cannot be pleaded as evidence, or admitted in any court to be useful or available in law or equity, as an acknowledgment of debt. If the appellants are right in this, there is an end to the cause. 2. As the receipt or document in question does not purport to be for money taken by or for account of the Bank of Scotland, or bear to be an acknowledgment by the bank, or its officers, or of any one authorized or acting for it, the person making a demand on the bank, as in virtue of that document, cannot prevail without further evidence. He must show that the money was applied to the use of the bank (which is not here pretended), or at least that it was *bona fide* given to, and taken by the person who signs the document, as the *agent of the bank*, or, in other words, that it was a transaction with the bank, and not with the person who signs in his private capacity, or a capacity different from that of the bank's agent. That the respondent gave his money to Smith & Sons, considering himself to be dealing

LORD JUSTICE CLERK (HOPE).—"This is not a case of mandate, but of open shop. A trader is not entitled to say, this clerk, and not that clerk, has the power to bind. So in like manner with a bank, the principal bank is not entitled to ignore the deposits made with its agent."

LORD HERMAND.—"I think the interlocutor right."

LORD CRAIG.—"I think the interlocutor wrong."

LORD MEADOWBANK.—"From a certain period all the money paid in upon receipts taken by those agents themselves, although at the same interest that the bank itself gave, are presumed to be for the bank. If otherwise, it would be a gross fraud. The whole of this mass of people could not believe that they were preferring the credit of the Smiths to the credit of the bank. The question of law is difficult; but, upon the whole, I think the bank bound. The whole money found in Smiths' possession was seized by the bank."

LORD BALMUTO.—"Suppose the agent had forged the notes of the bank, the bank would not have been liable."

LORD BANNATYNE.—"I am of the same opinion."

LORD WOODHOUSELEE.—"I am for altering. This was a gross deception; and I have changed my original opinion."

LORD GLENLEE.—"I am of the same opinion. All vouchers must be presumed to be for their behoof."

The interlocutor was altered, 15th May 1806.

with the bank, is mere assertion, which cannot be regarded, and it is contradicted by the tenor of the instrument he took, which bears no more relation to the Bank of Scotland than it does to the Bank of England. It is scarcely possible that any person would take such a document as that from the bank, or from Smith & Sons, in the capacity of agents, meaning to bind the bank. There is not a more settled and invariable rule of practice than that a receipt or obligation by one person for another, must in some way state who the principal is, and under whose character or authority the person signing acts. No man can be allowed so far to stultify himself as to pretend ignorance of this. So the case would have stood, if this had been the single instance of Smith and Sons giving such an acknowledgment for money received *privato nomine*; but when it is considered that they were in the daily practice of giving acknowledgments of the same tenor, and that the acknowledgments for money received by them on account of the bank, were of a tenor quite different, there is not even a presumption of the respondent's being deceived by his own ignorance, or that he was imposed upon by the Smiths. Supposing no document to have been given or taken, but the fact of a sum of money being deposited in that office proved or admitted, the case might have been attended with difficulty; but, in the actual one, there is no resisting the conclusion, from the tenor of the instrument, and the entries in the books of Smith and Sons, that they took the money *privato nomine*. But, 3. James Smith and Sons were not the general agents of the Bank of Scotland, acting in this instance within the scope of their authority. They had only a special and limited power to bind the bank in particular cases, and in a particular form, which was directly violated if the document in question was meant to bind the bank, or issued with a view to make the receiver believe that the bank was bound by, or had any concern with it. The nature of the agent's powers, and the extent of them, were notified to the public in every way that could reasonably be expected, by advertisement, by placards in the office, and by the general mode of transacting the business of the bank. Placards put up in the office are constantly received by the courts of law, and relied upon as a mode of notification to limit the general liability of carriers, &c., and to make a particular special contract, as between them and their employers, contrary to the general rule of law. An express notice of the mode of

1813.

BANK OF
SCOTLAND, &c.
v.
WATSON.

1813. doing the business, is not required in each particular instance. As to the liability of principals to the contracts of their agents, and the distinction between general and special agents, the appellants beg leave to refer to the case of Fenn and Harrison, where the late Mr. Justice Buller laid it down :—" That if a person be appointed a general agent, " as in the case of a factor for a merchant residing abroad, " the principal is bound by his acts ; but an agent, so constituted for a particular purpose, and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority, for that would be " to say, *That one man may bind another against his consent.*" There is no difference between the law of England and Scotland in this respect. " A mandatory (says Mr. Erskine) must follow the precise rules prescribed by his employer, for all his power is from the commission, and " whatever he does *ultra fines mandati*, is without authority, and cannot bind his constituent." It is held, even in the case of a factor, that he cannot pledge the goods of his principal, because his duty is to sell and not to pledge ; and so, in the present case, the employment and duty of Smith and Sons were, to issue sealed notes or obligations, in the name of the Bank of Scotland, and in a particular form.

BANK OF SCOTLAND, &c.
v.
WATSON.
3 Term Rep. 757.

Ers. B. iii.
tit. 3. § 35.

Newson v.
Thornton, 6.
Term Rep.

Pleaded for the Respondent.—1. The appellants having established James Smith and Sons as their accredited agents in the business of banking, in all matters relative to such business transacted in the office of the Bank of Scotland at Brechin, under the acknowledged firm of the bank agents, the respondent and the public were entitled to rely upon the credit and security of the Bank of Scotland : and the transaction now in question was within the common and usual operations of a bank agent. 2d. Besides, the advertisements and placards, founded on by the appellants as narrowing the general agency of those accredited by them, could have no operation in this case. Not only had the respondent no ground of information with regard to the advertisement and first placard, and all knowledge of the second placard, such as it was, was withheld from him by the act of the bank's own agents ; but even if such advertisements and placards had been directly and legally intimated by the appellants to the respondent, they contained nothing to put him in *mala fide* with regard to the transaction now in question. 3d. The respondent, therefore, *optima fide*, entered into the transaction in question, with the agents of the Bank

of Scotland, trusting to the security of the bank, without the knowledge of any specialties in the powers of the bank agents, or of the private business of banking, in which the appellants state them to have been engaged. 4. The form of the deposit receipt was such as to bind the appellants; it was within the common and usual powers of a bank agent, and contained, *in gremio*, not the slightest ground for suspicion that the agent did not mean thereby to bind his constituents; and it is not pretended by the appellants that any particular form was set out by them to the public, or even privately mentioned to their agents, in which receipts were to be granted. 5. And as to the want of stamp, it is, and has always been the practice of bankers in Scotland, to grant such receipts upon paper unstamped; and the exemptions from stamp-duties do clearly extend to the receipt in question.

1813.

BANK OF
SCOTLAND, &c.
v.
WATSON.

After hearing counsel,

LORD CHANCELLOR (ELDON) said,—

“ My Lords,

“ I shall trouble your Lordships very briefly on the subject of this case. It rises out of an action in the Court of Session, brought by James Watson, baker in Brechin, against the Bank of Scotland, concluding. (Here the Chancellor read the conclusions of the summons.)

“ Two questions occur in this cause :—1st. Whether the instrument founded on could be the subject of an action, the same being without a stamp? and, 2d. Whether the Bank of Scotland was bound to submit to the demand made upon them by the respondent, if the instrument upon which it was founded was not liable to stamp duty?

“ On the first of these questions, it was contended by the respondent, that no receipt for the deposit of money with any banker was liable to stamp duty. On the other hand, it was contended, that the instrument contained an agreement in writing, for the payment of the interest: and that it was something more than a receipt, and therefore required a stamp.

“ It was answered at the bar, that though it was a receipt containing a clause for the payment of interest, this was nothing more than a receipt according to the custom of banking in Scotland, such custom being to pay interest on the money deposited.

“ Whenever it may be necessary to decide upon this point, it will be necessary to inquire further into this custom, and what would have been the effect of the deposit without a written instrument?

“ It has not been correctly proved to us, that the interest in this case does not depend upon the written instrument. We see that the custom of the bank as to interest was variable from time to time.

1813.

BANK OF
SCOTLAND, &c.
v.
WATSON.

" It was said, your Lordships should let the parties get the instrument stamped on payment of the penalty. It is not my intention to give any opinion as to that. If such a case had occurred in an English court, and if the court had considered that an action could not be maintained on the instrument without a stamp, the party would have been non-suited; and if he could have got the instrument stamped on payment of a penalty, he might have brought a new action.

" It might be difficult to have this done, by any remit from this House. But I do not find it necessary to give any opinion on this point of the stamp.

" On the second question, it is to be noticed, that this is only a case where £60 is at issue, in the case of an individual. The bank states that the respondent is a creditor for £300 or £400 more; and it has been stated to us that the present case will decide many others, in consequence of an agreement to that effect.

" I don't know how that may be; if the principles in these other cases be the same with the principles here, the same rule will apply to all of them. But we have no cognizance of the agreement here. If the other cases are not the same with this, they will not be decided by the decision in this case.

" We had the good fortune, in this case, to have the assistance of the Lord Chief Justice at the hearing; he is more conversant with cases of this nature than any other person. His own words were, that this case could not have occupied his court for more than a quarter of an hour.

" The question here is, Whether an instrument, which makes no mention of the Bank of Scotland, (unless you shall hold the words, '*Bank Office, Brechin,*' to be such mention of the bank), and is merely signed '*James Smith and Sons,*' shall be held equivalent to an instrument bearing in the usual form '*Received for the Bank of Scotland,*' and signed by a person in the character of agent for the bank? And we are now called upon to deduce in law, from this state of the question, an obligation binding on their principals, without naming them.

" I admit that an agent, acting expressly as agent, would bind his principal in this form.

" But though these parties were agents, Were they disabled from contracting on their own personal liability? It might be very incautious in the Bank of Scotland to let these parties rival them, by carrying on business for themselves; but we cannot, by way of punishment, make them liable for having done so.

" Put the case of any person going to a country bank, in this country, which might act as agents for the Bank of England; Would it be possible, upon an instrument like this, to hold that the Bank of England was bound?

" All those of your Lordships' House who are conversant par-

ticularly in matters of this sort, concur in opinion, that you cannot ☐ 1813.
import into this instrument a liability on the Bank of Scotland.

“ I shall therefore move that this judgment be reversed.”

BANK OF
SCOTLAND, &C.
v.
WATSON.

LORD REDESDALE said,—“ As to the point upon the want of a stamp, I do not think it necessary to decide that.

“ The other question is simply this, Whether the agent shall be held to bind his principals, in an act where he does not profess to bind them ?

“ The instrument, so far from professing to bind the Bank of Scotland, does not mention it ; it is simply dated from the Bank Office, Brechin, and from thence it is inferred that the *Bank of Scotland* was bound. It is acknowledged that, in any transaction in the Linen Trade, these parties could not, by possibility, bind the bank.

“ The instrument, in this case, is signed simply James Smith and Sons, without purporting to be agents to any body.

“ Put the case, that the bank had become insolvent, and that Smith and Sons had continued solvent, could they have been heard to say, in any action upon this instrument, we were only agents ? I think they could not.

“ This appears to be decisive of this question—that they could not so discharge themselves of liability in any such question.

“ If the simple date shall be held to bind the bank in this case, it leads to very important considerations ; and all restraints on agents must be at an end.

“ The bank sets up certain safeguards and rules, both for the agent and for themselves,—namely, that the agents are to subscribe as agents,—that all their acts are to be controlled by another officer, &c. &c. If the respondent's proposition were to be listened to, all these would be annulled.

“ Suppose any man constitutes an agent, with particular instructions, and the agent does not attend to those instructions, and does not profess to bind his principal, Would you hold the principal bound, merely because an instrument was dated from his house ? Certainly not.

“ Upon these principles, and chiefly because I think it manifest that it never could be held that Smith and Sons, as individuals, would not have been bound by this instrument if they had remained solvent. I am of opinion also, that the judgment must be reversed.”

It was therefore ordered and adjudged that the interlocutor complained of be, and the same is hereby reversed.

For Appellants, *Sir Sam. Romilly, John Clerk, V. Gibbs.*

For Respondent, *Henry Erskine, Thomas Plumer, J. Gordon, Wm. R. Robinson.*

1813. JAMES WHITSON of Polcalk, Proprietor of the
Mansion-House, Parks, and Glen of Kilry, } *Appellants ;*
WHITSON, &c. and JOHN WHITSON, Feuuar of Kilry, }
v. SIR JAMES RAMSAY of Banff, Bart., Eldest Son }
RAMSAY, &c. and Heir of the deceased SIR WILLIAM } *Respondents.*
RAMSAY of Banff, Bart., by his Guardians, }

House of Lords, 14th April 1813.

PROPERTY—COMMON—SERVITUDE—DAMAGES FOR MOLESTATION.—

A declarator had been raised, together with separate actions of interdict and molestation, against the appellants, to have it found that they had no right of property, or common, or pasturage, casting of fuel, feal, or divot, over the respondents' lands of Alyth and the lands of Drumheads, &c., and to declare the lines of march which divided these from the appellants' lands of Kilry, and not to molest them in their possession, and for damages for molestation. The defence was chiefly rested on immemorial possession had by the appellants and their tenants, and no exclusive title by the respondents. Held, though the proof of possession on both sides was contradictory, yet, from the presumptive real evidence, arising from the state of the *natural* marches on hill grounds, the respondents had made out their right, and were entitled to interdict and to damages for molestation.

An action of declarator was raised by the late Sir William Ramsay against the appellants, to have it found that the appellants, and other feuars of Kilry, had no right of property, or common pasturage, casting of fuel, &c., and pulling heather, over a considerable part of the Forest of Alyth, belonging to him; and to have it found, "That the boundary " or line of march betwixt the lands of the Forest of Alyth " and the said lands of Drumfloghnies or Drumheads, belonging " to the pursuer, and the lands and hill of Kilry, belonging to " the said Thomas Whitson, and the other feuars and pro- " prietors thereof after specified, and who have right of pro- " perty or servitude therein, runs as follows, viz. From the " dykes of Fernyhirst up the burn of Kilrie, as the said burn " runs to the stripe or run of water called Dock Latch, and " from thence, as the said Dock Latch runs, ascending west to " the top of the Hare Hill, and so west as wind and weather " shears, to the top of the meckle hill called Knockton, and " from that west to the top of the hill called Broomholms, " until it comes to the marches betwixt the said Forest of " Alyth and the lands belonging to the heritors of Gleniala, " and the boundaries being so ascertained and declared,

“ march stones ought to be put in at the joint expense for 1813.
 “ preventing encroachments in time coming.”

To this action defences were lodged, stating, that the titles produced by the pursuer did not support his claim; and, in particular, “that the pursuer has concluded for an extension of his line of march far beyond the bounds it has ever been possessed by him, and which would be an encroachment on the defenders’ property. But as the rights of parties must, in a great measure, be regulated by the possession they have respectively had, it will be proper that the pursuer give in a condescendence of the possession he has had.”

WHITSON, &c.
 v.
 RAMSAY, &c.

A proof was allowed to both parties, and reported. After which, the Lord Ordinary pronounced this interlocutor:— May 14, 1799.

“ Having considered the mutual memorials and proofs, and amidst the contradictory testimony of the witnesses, having chiefly regard to that which is supported by the presumptive real evidence arising from natural marches in hill grounds, finds, That the march betwixt the lands of Kilry, belonging to the defenders, and the lands of Drumhead and forest of Alyth, belonging to the pursuer, runs from the dykes of Fernyhirst up the burn of Kilry, to the stripe or run of water called Docklatch; then by the said stripe, as far as it runs from thence to the top of the Hare Hill; from the top of the Hare Hill, as wind and water shears, to the top of the hill called Knockton; from thence westward to the top of the hill called Broomholm; and along that hill until it joins the march betwixt the Forest of Alyth and the lands belonging to the heritors of Glenisla; and the Lord Ordinary decerns and declares accordingly, and dispenses with a representation against this interlocutor.” On representation the Lord Ordinary adhered. On further representation, the Lord Ordinary Nov. 12, 1800.
 pronounced this interlocutor:—“ Finds that the line of May 12, 1801.
 “ march described in his interlocutor, from the hill of Knockton westward, to the top of the hill called Broomholm, and along that hill until it joins the march betwixt the Forest of Alyth and the lands belonging to the heritors of Glenisla, can only be meant to ascertain the boundary of the pursuer’s property on that quarter; but without determining what part on the other side of the line may be claimed as property by the defenders, and what by the heritors of Glenisla, or those of the Forest of Alyth, who are no parties to this process; and with this explanation the Lord Ordinary adheres to his interlocutor

1813. " of 14th May 1799." Two more representations were given in, but refused. And, on reclaiming petition to the Court, the Lords adhered. And also adhered on two further reclaiming petitions: an appeal was brought against these interlocutors to the House of Lords, and, pending that appeal, the appellants brought an action of reduction of the decree, upon the ground of *res noviter veniens ad notitiam*.
 ———
 WHITSON, &c.
 v.
 RAMSAY, &c.
 June 2 and
 17, ———
 Nov. 12, ———
 Feb. 9, and 20
 Feb. 1802.

An objection having been taken in the Court of Session, that this action could not proceed pending the appeal to the House of Lords; this appeal was allowed to be withdrawn, subject to the payment of forty guineas of costs. The action of reduction was then allowed to proceed. The defences stated to this action were, 1. That the decree called for could not be produced, it being in London, in consequence of the appellant's appeal. 2. That the matters in dispute between the parties were well adjudged, and determined in regular form, in the proceedings which ended in the decree now under reduction. The *res noviter* founded on was the discovery of written evidence, which established, as the appellants averred, that their authors had exclusively possessed the grounds in dispute. On the other hand, in the division of the Forest of Alyth, in 1719 and 1761, it appeared the boundaries and marches had been fixed, and that the appellants' authors did not appear to object.

May 27, 1806. The Lord Ordinary assoilized the defenders from the conclusions of this reduction. On reclaiming petition, the Court
 June 13, ——— adhered.

Notwithstanding these several judgments, the appellants continued to pasture their cattle on the grounds, which had been found to belong to Sir William Ramsay, as formerly, whereupon the present action of molestation was raised, concluding that they should be decerned to desist from doing so in all time coming, and also for damages; and, at same time, a suspension and interdict was presented. These actions having been conjoined, the Lord Ordinary, of this date, pronounced this interlocutor:—"Having heard parties' procurators, sustains the pursuers' titles, and finds, That the defenders must not trouble or molest the pursuers in possession of the lands in question, or any part thereof, in all time coming, and decern accordingly. And further, finds the defenders liable to the pursuers in damages, and allows a condensation thereof to be given in; and further, suspends, interdicts, and discharges the chargers, their servants, or any other employed by them, from molesting the suspenders in the peaceable possession of any part of the said

“lands, and from digging peats or turf in the moss mentioned in the suspension, or from carrying any that may have been dug there, and decerns. Finds the defenders, ^{1813.} ^{WHITSON, &c.} chargers in the conjoined actions, liable to the pursuers in expenses, and allows an account thereof to be given in; but supersedes extract till the sederunt day in “May next.”

On reclaiming petition, the Court remitted to the Lord Ordinary to hear parties further on any point not yet disposed of, but *quoad ultra* adhered.

Against the above interlocutors, in all the actions, the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The respondent, Sir James Ramsay, is bound to make out the affirmative of the conclusions of the summons of declarator, or he must fail in his action. He has, however, not only not done so, but the plan, pursuant to which he received his allotment of the Forest of Alyth, negatives the boundary contended for by him, which is further negatived by the testimony of many of his own witnesses, and by the evidence of all those examined on the part of the appellants. 2. The only rights proved to have been exercised by the respondents over the ground in question were, (1.) The erection of swine cruives on the skairs, which have been removed. (2.) The cutting of some turf on the stairs, in which his tenants were interrupted by the proprietors of Kilry, whose tenants also cut turf there. (3.) The pasturing of cattle by his tenants in *common* with the tenants of Kilry. The removal of the swine cruives, and the interruption in cutting turf, made it impossible to contend that any title by possession could be acquired in these instances; and the pasturing of the cattle of the respondent's tenants, as appears from the proof, was at a period when all the cattle in the neighbourhood pastured promiscuously, and marches were not kept; and it is not proved that any of these rights continued to be exercised for the period of forty years, which is necessary to give a prescriptive title by possession according to the law of Scotland. But even if they had continued to be exercised without interruption for such a length of time, the utmost they could confer on the respondent would be a right of servitude, or they might entitle the respondent to insist for a division of the ground as a common property, in which division all the ground occasionally possessed by the appellants would be included; but the respondent is now insisting in a declarator of exclusive property without a sufficient title, and he has totally failed in

1813. proving forty years uninterrupted possession. 3. At all events, the plan made out by Mr. Graham of Balgowan, and delivered to the respondent when he purchased the property, ought to have been produced, from which, according to the appellants' information, it would have appeared that his predecessor did not pretend right to the ground in question.

WHITSON, &c.
v.
RAMSAY, &c.

Pleaded for the Respondents.—As to the original action, the silence of the proprietors of the lands of Kilry, while proceedings were taking place of a very public nature, for a division of the Forest of Alyth, before different courts of law, and by arbitration, during a period of upwards of seventy years, and their not laying claim to any share of the property to be divided, show in the most decisive manner that they had no right to claim a share in such a division. 2. The marches between the respondent's estates and the properties of the appellants, are established in the most clear and explicit manner by the witnesses adduced in his behalf; though some contradictory evidence appears in behalf of the appellants, yet it is not of so decisive a character as *that* on the other side; and the respondent's witnesses are, from their superior means of information, or from their situations, more entitled to credit than those examined by the appellants. There is also evidence tending to show that some of the marches contended for by the appellants, had reference to the boundaries of persons in former times, claiming an interest in the Forest of Alyth, who are no parties in the present cause; the evidence adduced by the respondents is also supported by the nature and situation of the marches concluded for, and by the names of the ground now in dispute; while some of the best informed of the witnesses on the other side are not agreed as to the marches which the appellants wish to set up by their evidence. 3. The third reclaiming petition of the defenders in that action was justly refused by the Court as contrary to the act of sederunt, or rule of Court for the regulation of their proceedings. The matter of fact therein stated was not new matter of fact, but had already been argued upon by both parties. 4. The claim for the joint pasturage was never started till after the proof was concluded in the cause; this pasturage was merely by sufferance on both sides, and created no servitude. It would at least operate as strongly against the appellant as to his property as in his favour; for, if established, not only the respondent, but other proprietors, would

be entitled to a similar right of pasturage over the lands of Kilry. As to the reduction. The matter alleged as *noviter veniens ad notitiam* was such as might have been brought forward in the former cause with a very slight exertion of industry; and, on this ground alone, it ought to have been rejected by the Court. Besides, the matter was objectionable itself. It was the *ex parte* depositions of witnesses, without its being known in what cause they were given. And whatever the import of these might have been, they could have no weight in this cause.

1813.

SMYTH
v.
ALLAN, &c.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Wm. Adam, John Hagart, Fra. Horner.*

For Respondents, *Sir Samuel Romilly, David Douglas.*

NOTE.—Unreported in the Court of Session.

CHRISTOPHER SMYTH, Writer in Dumfries, *Appellant*;
JOHN ALLAN, Merchant in Dumfries; MAT-
THEW PALMER, in Drumdreg; and DAVID } *Respondents.*
GLEN, Writer in Dumfries, .

House of Lords, 10th May 1813.

PROPERTY — ROAD—MOSS GROUND — PART AND PERTINENT —
PAROLE TESTIMONY.—(1.) A party claimed exclusive right to a stripe of ground along a ditch or wall. And also a piece of moss ground, as part and pertinent of his property. He held a bounding charter, and failed to prove forty years' possession. Held that he had no claim. (2.) He also claimed exclusive right to a road; he could show no written title to this, but offered parole evidence that his predecessor had, along with another, purchased the ground for the road. Held this parole evidence insufficient against the respondents' possession and use of the road as a pertinent of their property.

A claim was made by the appellant to the property of a certain piece of moss ground, within the territory of the burgh of Dumfries. 2. To a ditch on the boundary line of his property, called Deadmanshirst or Lochisle. 3. To exclusive right to a road intersecting the appellant's and the respondents' lands.

What was called a ditch by the appellant, consisted of a

1813. *SMYTH*
v.
ALLAN, &c. stripe of land, three feet broad, between the dike that bounds Deadmanshirst and a ditch, *within* the respondents, Allan and Palmer's properties,—the dike being the boundary of the two properties. The moss ground marked C. on the plan, also claimed by the appellant, belonged to the respondent Glen, as acquired by him from the burgh of Dumfries. And the road in question was a road which lay intersected between Glen's property and the appellant's, and all of which the appellant claimed exclusive right to, as part and pertinent of his property, and as having been possessed as such for time immemorial.

The appellant having proceeded to dig pits or holes within the stripe of ground belonging to Allan and Palmer, they presented a petition to the magistrates and council of Dumfries (who were the parties from whom Allan derived his right), praying to prohibit and discharge him from disturbing their possession.

The appellant's answer was, that notwithstanding the ground lay on the outside of the bounding or march-dike of Deadmanshirst, yet it is a portion of these lands, and belonged to him as the proprietor thereof. This assertion was denied, the respondents alleging that the ground had been possessed as their property, at least since the date of their feu-charters in 1763. The magistrates granted an interim interdict, and remitted to a Committee of their body, to allow a proof, to visit the subjects in dispute, and finally to determine the premises. A proof was allowed accordingly. And April 15, 1802. the Committee, in the first place, pronounced this judgment:—"In respect the petitioners have proved possession of the pieces of ground in dispute, for more than seven years, continue the interdicts formerly granted in time coming, and ordain the respondent to fill up the pits or holes complained of within eight days from this date, and decern accordingly, but find no expenses due, except the dues of extract, for which decern against the respondent Smyth."

The appellant removed the case to the Court of Session by advocacy, and brought a declarator, which being conjoined, the Lord Ordinary pronounced this interlocutor:—July 9, 1803. "Having considered the condescendence and answers thereto, and the whole process, in the declarator assolis the defenders and decerns; and in the advocacy advocates the cause, and continues the interdict; finds the pursuer liable in expenses, and allows an account of the same

"to be given in, but supersedes extract till the third seditious day in November next." 1813.

On representation, offering further proof as to the possession of the moss, the Lord Ordinary allowed a proof to both parties, upon considering which, he adhered to his former interlocutor. And, upon reclaiming petition to the Court, the Lords adhered, and refused the prayer of the petition. WHITE
v.
ALLAN, &c.
July 8, 1805.
Nov. 20, 1805.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—As to the stripe of ground, it is a general practice, in enclosing the burgh roads of Dumfries, to raise the dike out of the ditch or sheugh, and it is clearly instructed by the evidence that this practice was observed in enclosing the lands of Deadmanshirst. Further, it is instructed that the dike has been always repaired by the proprietors of Deadmanshirst with the materials taken from the ditch or sheugh in dispute; and that these proprietors reaped the grass which grew on the ditch, and on the brow of the ditch beyond it. 2. As to the moss ground, this belongs to the appellant, as part and pertinent of his principal subject; and the respondent Mr. Glen, in laying claim thereto, transgresses the limits of his property, as pointed out in his own title deeds. 3. The road in dispute is the appellant's private property; the same having been purchased by one of his authors, Mr. Riddle, and enjoyed by his successors, as their exclusive right; cross bars having been put upon it by them to prevent others from using it without their leave; and any acts of possession by the respondent Glen, are proved to have arisen from mere tolerance.

Pleaded by the Respondents.—With regard to the stripe of land, if any difficulty arose from the smallness of the stripe in question, this has been entirely removed by the proof of possession had by the former author, and by the respondents' tenants. The witnesses Richardson, Walker, Glassel, Tait, Carruthers, and Stein, depone to the respondents' possessing, by ploughing up close to the very wall. Besides, in the title deeds of both parties, the dike of Deadmanshirst is described to be the boundary between the two properties. The appellant cannot claim a right of property beyond his own boundary. An adjacent subject may be acquired, as part and pertinent of another, by possession for forty years, but not where the property of the party claiming is held by a boundary charter which excludes all beyond. 2. As to the moss ground C, the subject conveyed to

1813. **Mr. Riddle, the appellant's author, is the park or enclosure of Deadmanshirst, of which the moss ground C is no part, consequently, supposing Mr. Glen could not show this piece of ground to be his, it manifestly could not benefit the appellant, but it would revert back to the burgh of Dumfries. The appellant has no interest, therefore, to challenge his right; but, in point of fact, the ground in question was conveyed to the respondent Glen by the charter 1763. No doubt the appellant pleads possession as part and pertinent of his property, but, as already noticed, he cannot claim on this ground, because, 1st, He has a bounding charter; and, 2. Because if his charter was not a bounding one, he has not proved possession for forty years. 3. The appellant has not proved an exclusive right to the road described in his summons. Some of the witnesses deposes to the purchase of the ground, on which this road is formed, by Mr. Riddle, his author, and Mr. Copland of Collieston. But, by the law of Scotland, the title to an heritable subject cannot be made out by parole testimony; and the proof amounts to no more than that a servitude in favour of these gentlemen was conferred by Swan, the proprietor of the ground. Such right in Messrs. Copland and Riddle is not incompatible, but perfectly consistent with a similar one being acquired by the respondent Glen. It is proved that the possession of the respondent and his tenant was nearly coeval with the formation of the road itself; and there is no evidence of any interruption or challenge of their right, except what is mentioned by John Dickson, the former proprietor of Deadmanshirst, that his father, on one occasion, prevented Robert Muir, the tenant of the respondent, from driving his cattle along the road. But he deposed, that since he first knew the properties in question, Mr. Glen and his tenants have been in use of driving their cattle up and down said road, and that he never challenged them for so doing except in the above instance.**

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £100 costs.

For the Appellant, *Wm. Adam, Tho. W. Baird.*

For the Respondents, *Robert Corbet.*

NOTE.—Unreported in the Court of Session.

1813.

ALEXANDER M'ADAM, Esq., Apparent Heir
of Tailzie and Provision to QUINTIN } *Appellant* ;
M'ADAM, Esq. of Craigengillan,

M'ADAM
v.
WALKER, &c.

ELIZABETH WALKER, designing herself Wi-
dow of the said QUINTIN M'ADAM, and
her Children, and SIR WILLIAM CUNYNG- } *Respondents*.
HAME, Bart., and Others, Tutors and
Curators to the said Children,

House of Lords, 24th March 1813.

RECALL OF SEQUESTRATION.—Circumstances in which a sequestration
of real estate was recalled, for which there had been a competition.

John M'Adam executed a strict entail of his estate of
Craigengillan in favour of his own children ; whom failing,
upon the appellant, his nephew.

It was alleged by the appellant, that Quintin M'Adam,
the only son of John, succeeded in 1789, and made up titles
under the entail, and, in virtue thereof, possessed the estate
until the 22d March 1802, when he put an end to his own
existence, by discharging a pistol into his mouth.

The appellant further alleged that he was never married,
but that he had natural children, by different country girls,
and two of these children were resident in his mansion house
of Barbeth, with their mother, at the time of his death.
That this lady, Elizabeth Walker, insisted upon keeping
possession, upon the pretence that Mr. M'Adam, on the very
day when he shot himself, and within an hour or two of his
committing the act, had made a declaration, in presence of
some of his servants, that he was married to Elizabeth Walker,
whereby, it was said, her children were legitimated.

In these circumstances, the appellant, who was the nomi-
natim heir apparent of tailzie, proceeded to assume posses-
sion in that character ; but being opposed by Elizabeth
Walker, he presented a petition to the Sheriff of the county
in which the mansion house was, praying for instant delivery
of the keys of the charter chest, and other repositories, and
to decern them to lodge the same in the hands of the clerk
of Court, and praying to decern Mrs. Walker to remove from
the mansion house. The Sheriff allowed inventories to be
taken. Of this judgment the tutors brought an advoca-
tion, and the Court found (8th June) neither party entitled

1813. to the possession of the entailed estates or the title deeds. The appellant also brought an advocacy, but it was refused, of same date.
- M'ADAM**
v.
WALKER, &c. In the meantime, a competition of brieves was going on before the Macers, between the appellant and Catherine M'Adam, eldest daughter of the said Quintin M'Adam. In these brieves the Lords sisted proceedings "till a decret of declarator is produced, ascertaining the legitimacy or illegitimacy of the claimant, Catherine M'Adam."
- July 1805. The appellant then applied by petition to the Court of Session to sequestrate the estate, and this interlocutor was pronounced: "The Lords having advised this petition, they sequestrate the whole entailed estate of Craigengillan, and appoint Mr. Crawford Tait, writer to the Signet, to be judicial factor thereon, with the usual powers, he finding caution before extract."
- July 11, — The declarator of marriage and legitimacy was proceeding in the Court, and, on 16th April 1806, was decided in favour of Elizabeth Walker, in the Commissary Court, and on 13th Nov. 1806 and 4th March 1807, in the Court of Session.
- Mrs. Elizabeth Walker had given birth to a son after the death of Mr. M'Adam, and tutors and curators having been appointed to the son (Quintin), a petition was presented to the Court to recall the sequestration of the entailed estate, and to find that the tutors and curators for Quintin M'Adam are entitled to possession of the same. After answers were lodged to this petition, the Court pronounced this interlocutor: "Recall the sequestration of the entailed estate of Craigengillan and appointment of the judicial factor thereon, and find the petitioners, as tutors for Quintin M'Adam, are entitled to possession."
- Mar. 11, 1807. Against this interlocutor the present appeal was brought, chiefly grounded on the allegation that it was premature, pending an appeal to the House of Lords, to recall the sequestration, and to find the respondents entitled to possession of the estate. The answer made to this was, that the sequestration was awarded before any evidence of the legitimacy of Mr. M'Adam's children had been led; but now that this evidence had been taken, and had been held to be conclusive in establishing the legitimacy, the Court were entitled to act upon that evidence and upon the whole circumstances.

After hearing counsel, it was

Ordered and adjudged that the interlocutor complained of be, and the same is hereby affirmed. 1813.

For the Appellant, *Henry Erskine, John Clerk.*
For the Respondents, *Sir Sam. Romilly, Ad. Rolland,*
Geo. Cranstoun, Tho. Thomson. M'ADAM
v.
WALKER, &c.

[Dow's Reports* et Mor. App. Proof, No. 3. and 4.]

ALEXANDER M'ADAM, Esq., Apparent Heir
of Tailzie and Provision to QUINTIN } *Appellant*;
M'ADAM, Esq. of Craigengillan,
ELIZABETH WALKER, designing herself Wi-
dow of the said QUINTIN M'ADAM, Esq., } *Respondents.*
and Others,

House of Lords, 21st May 1813.

MARRIAGE—LEGITIMACY—PROOF—INSANITY.—(1.) Circumstances in which a man made marriage with a person then living with him, and who had born him two children, and who was pregnant with a third, by declaring before witnesses, called in to witness the ceremony, that he “took them to witness that this is his lawful married wife, and the children by her, his lawful children;” and this declaration being assented to on the other part, was held as a lawful marriage. (2.) The gentleman having shot himself a few hours thereafter, the plea of insanity was set up against the marriage, but held this was not proved. (3.) It was contended that a marriage, celebrated in this form, was, like a promise, incapable of being proved by parole evidence alone, without some writing or acknowledged solemnity to support it: Held that parole was competent. (4.) In the proof the appellant offered to prove constitutional tendency to insanity in the deceased's family, by offering evidence as to the insanity of his progenitors, but the Court held it incompetent to prove the insanity of M'Adam by such facts. Affirmed in the House of Lords except as to the fourth point.

By deed of entail, the estate of Craigengillan and others had been destined to Quintin M'Adam and other heirs,

* Some cases in Dow are imperfectly reported. These will be reported here, in order to supply omissions.

1813. "whom failing, to Alexander M'Adam (the appellant), and
 "the heirs male of his body."

M'ADAM
 v.
 WALKER, &c. The deceased Quintin M'Adam, it was alleged, had never
 married, but had several natural children. One, a son,
 born of Mary M'Whirter; and of his connection, sometime
 thereafter, with Elizabeth Walker, there were two daughters
 born before his death, and a son born *after* that event.

Mrs. Elizabeth Walker raised the present declarator of marriage, to have it found and declared that she was lawfully married to Mr. M'Adam, and that her daughters, Catherine and Jane, and the child or children *in utero* of the said Elizabeth Walker, were the lawful children of the said marriage.

Elizabeth Walker had lived with Mr. M'Adam for several years, and at the time (March 1805) when the act she founded on as establishing her marriage was performed, she was then pregnant, and was a few months thereafter delivered of a son. He had frequently expressed not only to herself but to others, that he intended to marry her, in order to render his children legitimate, and his connection with their mother honourable, and this was established by the proof. In pursuance of this resolution he wrote the following letter to his law agent, Mr. Smith, "Berbeth, "21st March 1805. Dear Sir, As I intend to marry "Miss Walker immediately, come out as soon as you "receive this, and bring stamped paper to write the contract, and every thing requisite to draw up a deed, to "leave the whole of my landed property that I now have, "or may afterwards acquire, strictly entailed.—I am, Dear "Sir, your's sincerely, Q. M'ADAM. Mention this to no person, not even your son." Q. M."

This letter was posted for Edinburgh the same evening, and was received by Mr. Smith on the 24th. But, on the morning of the 22d March, when at breakfast, the deceased stated to the respondent that he wished to declare their marriage immediately, without waiting for Mr. Smith's arrival; and she having expressed her consent, Mr. M'Adam, "between the hours of ten and eleven o'clock of the forenoon "of that day," desired his house servant, George Ramsay, to call in three of his men servants. When these persons had come into the dining room, Mr. M'Adam told them that he had called them to be witnesses to his marriage; and immediately thereafter asked Elizabeth Walker to rise up, which she did; and having given her hand to Mr. M'Adam, he

holding it, said, "I take you three to witness that this is my lawful married wife, and the children by her are my lawful children;" which acknowledgment and declaration on his part was explicitly assented to and acquiesced in by the said Elizabeth Walker; and, on the coming in of Margaret Wylie, for whom he had also sent to be a witness, this same declaration was repeated a second time ANTE OMNIA. Thereafter Mr. M'Adam went out to see his workmen, and calling at the house of David Woodburn at Bellsbank, informed him that he had declared their marriage, whereupon Mr. Woodburn said he had heard so from one of the witnesses, and wished him much joy. He then asked Woodburn to dine with him that day at Berbeth.

1813.

M'ADAM
v.
WALKER, &c.

Mr. M'Adam returned to Berbeth house between three and four o'clock. One of the servants heard, a short time afterwards, the report of a pistol, but took no further notice until the time when the dinner was laid; and, on going up stairs where Mr. M'Adam was, to inform him of the fact, he found him lying on the top of the staircase dead, with two pistols in his hand, and one found discharged.

Various proceedings occurred, and proof was allowed, not only of the marriage, but also of the allegation of insanity made by the appellant, as incapacitating him from entering into a marriage. The appellant also offered to prove a constitutional tendency to insanity, by offering evidence as to the insanity of his progenitors, but this was not allowed by the Court.

Jan. 20, 1806.

On the whole cause, the appellant maintained three grounds:

1. That the deceased was, from insanity or mental derangement, incapable of contracting a marriage at the time when the pretended marriage with Miss Walker took place.

2. That the appellant ought to have been allowed the further proofs he offered with respect to that insanity.

3. That the respondents had not proved the pretended marriage by any competent and legal mode by which marriage can be constituted in Scotland; and that parole testimony was incompetent to prove a marriage in the way this is said to have been gone into.

The Commissaries pronounced this interlocutor:—"Hav- April 16, 1806.
ing resumed consideration of this cause, with the productions and proof for both parties, and whole process, find it proven by real evidence, that some years prior to the year 1805, the late Quintin M'Adam had formed a resolution of making the pursuer, Elizabeth Walker, his wife, and

1813. M'ADAM
v.
WALKER, &c.

"legitimizing the children which she had born to him at some future period: Find it clearly proven, that on the forenoon of the 22d day of March 1805, Mr. M'Adam carried this purpose into execution, by joining his hands with those of the pursuer and declaring her to be his wife, and her children his lawful children, in presence of several persons whom he had called up to his dining room to be witnesses to this declaration: Find that this declaration was made in the most solemn, serious, and deliberate manner; that the late Mr. M'Adam was in his perfect sound mind; that the deportment of the pursuer clearly indicated her approbation of what Mr. M'Adam had done; that on this occasion Mr. M'Adam and the pursuer mutually accepted of each other as husband and wife: Find these facts relevant to infer marriage betwixt the late Mr. M'Adam and the pursuer; that by this declaration the status of the pursuer as his wife, and of her children as his lawful children, was fixed, and could not be affected by any subsequent act of Mr. M'Adam: Find the condescendence on which the defence was founded not proven, and repel the defence, and decern in the conclusions of the marriage and legitimacy in terms of the libel."

The proof upon which the above interlocutor of the Commissaries proceeded was part parole and part by writing. There were the following letters adduced to prove Mr. M'Adam's ultimate views in regard to Miss Walker: To Mr. Smith, his Edinburgh agent, he wrote,—“16th Feb. 1800. Dear Sir, I am going to take a girl into keeping: Her name is Elizabeth Walker, daughter of the late John Walker in Knockdon, parish of Straiton. Get two bonds wrote instantly, and be sure to send them by the very first post to Ayr, binding me and my heirs to pay her sixty guineas yearly so long as she lives. Write them so, that if I at any time *marry her* that she gets no more jointure, unless provided by a subsequent deed. I mean by that, to prevent any claim to a third of the moveables. I suppose it can be done; if not, write them as you see best. Be sure that they arrive at Ayr on Wednesday or Thursday at furthest. I shall be in Edinburgh the first week of March, and will bring in the will; but is it not better to allow it to remain as it is, until we see *what this produces?* I remain, Q. MACADAM.” Another letter to Elizabeth Walker's brother was in these terms:—“Dear James, You will perhaps be surprised when I tell you your sister has come to

“live with me. But I hope you will not be angry when I
 “assure you that I mean to behave to her in the most hon-
 “ourable manner. I have already settled sixty guineas on
 “her yearly during her life. *I have made her no promise of*
 “*marriage, but it is very probable it will end in that.* She
 “and I would be very happy you would come over to-day,
 “and if there be any further explanation you wish, I shall be
 “glad to make it you. I am, Q. MACADAM.”

1813.

M'ADAM

v.

WALKER, &c.

Previous to the delivery of her first daughter in the month of January 1801, Mr. Macadam wrote to his Edinburgh agent in the following terms:—“Berbeth, 19th Jan. 1801. Miss Walker will *lie in* in a few days; if I get the minister of the parish to christen the child, and pay the fine for a bastard child, will that, in the event of my ever wishing to declare a marriage, have any effect of illegitimizing that child, or will it do it? Answer this immediately, it is the only part of the letter that requires an answer.” To this letter Mr. Smith immediately wrote the following answer:—“Edinburgh, 22d January 1801. Dear Sir, I am this day favoured with yours of the 19th. Upon Miss Walker’s inlying, and your getting the minister to baptize the child, and your paying the fine for a natural child, all this will not prevent your afterwards legitimating the child, by declaring a marriage, in case you should afterwards choose to do so. From the time of the declaration of marriage the legitimacy of the child draws back to its birth, provided no other marriage has intervened.”

Then there followed the evidence of county gentlemen, who had dined at Berbeth, and who gave evidence to Elizabeth Walker sitting at table, and to Mr. Macadam becoming, particularly for the two years previous to his death, more kind and attentive. Several witnesses spoke also to his having conversed with them in a manner which led to the conclusion that he had an intention to marry Elizabeth Walker, in order to legitimate his children.

As to the plea of insanity, evidence was adduced that Mr. Macadam was a man of superior abilities and soundness of judgment; and this was followed by the evidence of the declaration of marriage, as above set forth.

Against the interlocutor of the Commissaries, a bill of advocacy was brought, but the Lord Ordinary refused the Nov. 13, 1806. bill, and, on reclaiming petition, the Court adhered. In pro- Mar. 4. 1807. nouncing this judgment, the Lords of the Court of Session delivered the following opinions:—

1813.

Opinions of the Judges:—

MACADAM
v.
WALKER, &c.

THE LORD JUSTICE CLERK (HOPE).—"The facts proved in this case are sufficient to constitute a legal marriage. I therefore lay it down as a fixed proposition, that here there is a marriage unless set aside, which we are desired to do, on an objection of the insanity of Mr. Macadam; but there is not the slightest ground to presume that he was so at the period of the declaration, nor the smallest idea of it in his former life. It appears that he had at Dollars a frenzy, for which, however, there is assigned a sufficient cause. He remained always in a firm state, at least to the date of the declaration. The connection he formed was with a woman whom he himself had seduced. By her he had children. His conduct shows plainly that his attachment to her was strengthened by the propriety of her behaviour; she bore him children, and he then took his resolution. For some reason, which I can suspect, but which is not explained, he did not wait for Mr Smith to make out his marriage contract, though he might mean a post-nuptial contract. He thought the sooner the marriage was declared the better; he resolves to solemnize it. If I ever saw a cool deliberate action it is this. What happened afterwards is unaccountable. I cannot think that he repented; the step which he took was the only one that, in such circumstances, a man of honour should take. I have had access to know something of a trial, where all the medical men in this city declared that the commencement of insanity was unaccountable. Marriage, although the most important contract into which man can enter, is, at the sametime, one of the easiest that the mind can form. I can figure cases where I could set aside a *contract of marriage* on the ground of facility in either of the parties, without setting aside the *marriage itself*. The marriage, in the present case, being then as valid as if done in the face of the church, must I presume that Mr. Macadam was insane at the time? I cannot. I remember one shocking case of a marriage which happened in England, in the neighbourhood of the school where I was: The ceremony had been performed,—the friends had met—there was a feast, dancing, and other things usual at the time on such occasions; in all these the husband took a share, but next morning it was found that he had killed his wife, and was gnawing her flesh. Suicide does not presume insanity, on the contrary, it is a crime punished by law. Insanity, in the present case, is not only not proved but disproved."

LORD NEWTON.—"I am clearly of opinion, from the written evidence, that Mr. Macadam from the first intended to marry the pursuer. There never happened any remarkable occurrence without his expressing this intention: his child he calls after his mother. His conversation with Mr. Campbell of Treesbanks has such an effect on his mind, that he declares that he would have betted that Mr. Macadam would marry the pursuer. Last of all, I see him write so in

express terms to Mr. Smith. This was the wisest thing he could do. He found the woman in every respect as he wished, and such her influence, I mean a proper influence, that he did not indulge himself in levity before her. I will not enter into the defender's argument, that a proof could not be allowed after death, as it appears to me destitute of the least foundation. This I hold to be as good a marriage, as observed by one of your Lordships on a former occasion, as if it had been celebrated by the Archbishop of Canterbury, or the Moderator of the Kirk of Scotland. With regard to the plea of insanity maintained by the defender, which is founded on the circumstances that took place at Dollars; these, so far from proving him insane, prove him, in my opinion, the very reverse. The surgeon no sooner sees him than he at once mentions the cause, and that, after a little medicine, he would get well, which accordingly was the case. Lord Eglinton's character is well known, and he selects Mr. Macadam as one of the most able men in the county to be a Deputy-Lieutenant, and to command a regiment. It is possible that his death was by accident, but, if otherwise, that act does not prove insanity. I never was more clear than that this is a good marriage."

LORD ARMADALE.—"I shall only say a single word. I first thought the case one of great difficulty; but now that we have the whole cause, and the proof before us, there does not exist the smallest doubt or difficulty in my mind of the validity of the marriage. The interlocutor of the Commissaries, both in law and on the evidence, is sound. Mr Macadam's resolution and intention were the strongest possible. There is the clearest evidence of the declaration of the marriage. Upon the whole, I concur in opinion with the Lord Justice Clerk, and that Macadam was sane at the time."

LORD HERMAND.—"I had some doubt at first, from the manner of stating the cause, by which the evidence of marriage seemed to be rested on a mere *emissio verborum* offered to be proved. But that defect is obviated by the narrative in the summons of declarator. If it had not, there would have been much in the defender's argument that, as a *promise* cannot be proved, so, upon the same principle, neither ought *mere words*. The summons states, 1. That the intention to marry the pursuer, and legitimate her children, was communicated to several persons. 2. That Mr. Macadam sent for his servants into the dining room, and asked the pursuer to rise. 3. That this was repeated in presence of others. 4. That congratulations took place upon the occasion. 5. That the declaration was mentioned by Macadam to Mr. Woodburn. If these things are proved in a legal manner they constitute *marriage*, and, whatever may be thought elsewhere, they *ought* to do so. The evidence, 1st, Of the previous intention, of which the conversation with Treesbanks is a material circumstance, is not obviated by anything on the other side. But it gives insight into the ideas of Macadam, though not correct perhaps, and confirming the report mentioned by Mr. Oswald, that Macadam was to marry

1813.

M'ADAM
v.

WALKER, &c.

1813.

M'ADAM
v.
WALKER, &c.

the pursuer if she had a son. The letter of 21st Feb. 1800, to the pursuer's brother, held out a prospect of marriage. That of the 16th to Mr. Smith is also material. If at any time he should marry, he was anxious, as in a probable event, to guard against giving the wife a right to the third of the moveables. His will, he says, is to be delayed till we see what this produces. He mentions, in the letter of January 1801 to Mr. Smith, that Miss Walker lies in soon, and inquires if the circumstance of the child being baptized as a bastard will prevent legitimation. Mr. Smith's answer of the 22d January shows his idea of the probability of Mr. Macadam marrying, and this child he names for his mother. His treatment of the pursuer is very different from that of most mistresses, his conversation is more delicate than even before his mother and sister. 2d, The declaration to Woodburn, on 21st March 1805, of intention to marry the pursuer; and the anxious letter to Mr. Smith, proves a fixed intention, unless he has been proved mad at the time. 3. The celebration, of which the evidence is clear and satisfactory, proves the statement in the libel. The trifling discrepancies only add to the effect of the whole; and it is confirmed by subsequent declaration to Woodburn. Is this less effectual than some words uttered before a person assuming the character of a clergyman, but truly not in holy orders? It is not disputed that *that* is effectual. It could not be disputed agreeably to the law of Scotland. I pay little regard to criticisms on precise words of witnesses; they all go to this, that there was a *declaration* of marriage *de presenti*. It is said that in marriage contracts the words are: 'We take each other for lawful spouses.' Yes; but other words follow, binding the parties to celebrate the marriage with their first convenience. It is said that the pursuer did not declare her acceptance. That she was not bound, nor could have been prosecuted for *bigamy* by the act 1551, c. 19. But she stood up when asked. She voluntarily joined hands twice, and accepted of congratulations afterwards. I will not run through the decisions. They establish the principle, that, like other consensual contracts, marriage is proveable *prout de jure*, subject, however, to some restriction, that the evidence be such as suffices *fidem facere judici*. Nothing remains but the plea of insanity, a plea that could only have occurred from the fatal end of Macadam's life. For it is difficult to imagine, in opposition to the testimony of so many witnesses of the highest respectability, that the defender could really believe his cousin was habitually insane, and certainly no such thing has been proved, but the contrary. Whatever encomiums the defender may bestow on his cousin Logan, he does not appear to have been in use to attend Mr. Macadam, unless an account of a few shillings should show him to have done so; I pay no regard to his *decided* opinion that Macadam was under the influence of melancholic insanity to a certain degree. I have, however, little doubt that he committed suicide, which generally proceeds from insanity at the time. But it may come like lightning:

God knows when it may. I think such was the case here, as Macadam was rational at the time of the ceremony; and rational in conversation with Dr. Hathorn and with Mr. Woodburn. It is said, that having formed the intention of suicide, he asked Woodburn to dinner. This strikes me in a different light. I rather conceive that he wished to drink the health of his new made wife, but was afterwards suddenly seized with insanity, in which situation he may have written the note about the three pointers, ludicrously called a codicil to his settlement."

1813.

M'ADAM
v.
WALKER, &c.

LORD WOODHOUSELEE.—"It has been a reproach that the law is so loose in the essentials of marriage, that it requires more form for the most trifling bargain about heritage, than is necessary for this most solemn of all contracts.—This is the narrowest question that ever occurred. After the fullest consideration, I have formed an opinion that this is not a legal marriage. The tutors, however, have done their duty. I rest my opinion on two grounds, 1st, Supposing Mr. Macadam really sound at the time he entered into this declaration, a ceremony gone into in such a manner, not followed by consummation, or *consortium vitæ*, was invalid, and ineffectual to constitute marriage; but, 2dly, I consider Mr. Macadam not at that time to have been capable of giving a deliberate consent. His declaration is nothing more than an obligation to enter into marriage, either by celebration *in facie ecclesiæ* or cohabitation. He did neither, and made it impossible—the obligation remained unperformed,—the declaration is not effectual,—two or three hours after, he might have called the same witnesses, and retracted while matters were entire. In another view, what is marriage but *consortium vitæ*? This is the essence of marriage, and certifies the connection; it is a consent that forms that *consortium vitæ*; if the man, however, declares that this shall not be, or by an act does so, the thing puts an end to it. It is plain that Mr. Macadam had resolved, that though he performs this ceremony, he had taken a determined resolution not to be bound by it. There is no way by which natural children can be legitimated, unless the father gives himself the character of husband as the law regards that relation when truly meant. I state these on the supposition of Mr. Macadam being sane. It was an obligation he never meant to perform; but he was not in possession of sound mind. There never was a more unfavourable case.—Mr. Macadam, in possession of immense fortune, for a course of years carries on a licentious intercourse, under a sort of indenture of prostitution; he writes a letter to Mr. Smith; does not sleep for three, four, or five nights; there shall be no contract; his impatience would not wait; he calls the servants, and makes a formal declaration; the writers on medicine describe the very case. These authorities speak sufficiently, and are conclusive to my mind. On the whole, my opinion is, that the judgment of the Commissaries is wrong."

LORD BALMUTO.—"The mode of proof betwixt a promise and

1813.

MACADAM
v.
WALKER, &c.

declaration is different. The last is proveable by witnesses; declaration takes place immediately; no case comes up to the present; a consent merely expressed in words is not sufficient; intention is here expressed; but after that we have Mr. Macadam's opinion in a formal deed. Mr. Macadam in it states, that he never intended to celebrate a marriage; but he was not in a sound state of mind, of which no stronger instance is necessary than the suicide; the evidence of all the servants establish periodically fits of insanity; Mr. Woodburn is not a fair witness; Mrs. Wylie is alarmed at once for Mr. Macadam; at Dollars, he expressed a determination to finish himself. In these circumstances, a declaration not followed up is not sufficient. Mr. Macadam was not in sound mind, and he did not intend to give his consent."

LORD CRAIG.—"My opinion is, that the interlocutor of the Commissaries is right. I will not go through the evidence of the declaration, or of Mr. Macadam's previous purpose. I am clear that this is not a promise of marriage, but a formal declaration, twice repeated, and in the most deliberate manner. This declaration, obligation, and contract, is as binding as if done by a clergyman after proclamation of banns. By it a *jus quæsitum* was instantly acquired by the lady and the children;—it may have been done with a view to give a status to the lady, and to legitimate the children. It is said that Mr. Macadam was not in his sound mind, but there is no proof of insanity, quite the reverse, as there is the strongest proof of his sanity. He had indeed stomach complaints occasionally; and on this subject the defender's strongest witness, Logan, expressed himself stronger than proper, and stands alone. This species of disorder is more usual than is generally supposed. There is evidence of Mr. Macadam's being that very day in sound mind,—what happened at Dollars was the effect of a riot, and was not the usual habit. The surgeon at once removed it. The last act, I am inclined to think, does not show him insane, and indeed that act, rash, violent, and criminal though it was, affords no proof of insanity. Among the Romans it was esteemed a virtue; but they had not the advantage of our religion; this act the law considers criminal. I feel the weight of the argument stated by Lord Woodhouselee, to find a thing to be a marriage, which, it was supposed, was not meant to be so. But if there is a marriage, a *jus quæsitum* acquired by third parties, a concluded deed, it is binding;—marriage, even on deathbed, is held good. By the law of Scotland, here, then, there was a valid marriage, and if Mr. Macadam had lived, he could not have married another woman. By that law, this is just as valid a marriage as if it had been done *in facie ecclesiæ*, after proclamation of banns; and indeed that case does not appear materially different from the present."

LORD MEADOWBANK.—"The case is not without difficulty. I felt the force of the arguments in the defender's memorial. There is

no doubt about the law of Scotland ; and I approve of that law as it exists, and the general habits of the people prove it to be good. I want no change in the marriage law. In no country that I know of is there so much correctness in the intercourse of the sexes ; and there is no source to which this can be ascribed with so much propriety as to the law. The Council of Trent first introduced the doctrine, that marriage without a priest was invalid,—but that Council had no force in this country. Here there is not an obligation or promise, but a marriage solemnized, and comprehending every essential that the law of Scotland requires, and no doctrine can be quoted contrary to it, except that of Lord Kames, which is universally reprobated. This Essay is, throughout, a tissue of error, always brought forward in consistorial causes of the present description, and always treated with contempt by the Court. He stated what, according to his ideas, should be the law, and, in so doing, gave a statement of our law calculated to shake it : indeed, his statement is contrary to all sound authority, and to decisions of this Court. Lord Stair's, Lord Bankton's, and Mr. Erskine's, are the opinions of the Court, the bar, and the country. The quotation from Macinnes is taken from the Faculty Collection, where only the one half of it is given ; but there is a strong argument to be drawn from that case, as there the House of Lords held a *consensus de presenti* sufficient to constitute marriage, although the consent in that case was not sufficient. As so many of your Lordships have delivered your opinions, in which I concur, that this is a good marriage, I will not take up more time ; I view it to be as valid as if done by a priest. I heard it stated that Mr. Macadam did not intend to act as a husband, and that he had formed this resolution ; but supposing there had been such a resolution previously adopted, of which there is no evidence, Can it be pretended that any such resolution was communicated to Elizabeth Walker ; and did she accept of him on these terms ? If so, it was a mummary ; but if not, did she not enter into the contract *optima fide* ? And is not that contract a *consensus de presenti*, constituting a marriage of itself, and requiring no subsequent cohabitation to confer on it any additional validity ? —It appears to me that it is out of sight to maintain now-a-days an opposite notion. Whence is it that Lord Stair derives the validity of promise followed by *copula*, but from the consummation, implying that a *consensus de presenti* had intervened, which is of itself marriage, though no clergyman is present to bestow his blessing ? The notion of the law is, that *that copula* proves the *consensus de presenti*, being the consummation of an actual marriage, and, of course, presuming such a *consensus* where there had been only a promise. It is by no means on the notion that *copula* bars *locus prenitentia*. For without the *consensus de presenti* there could be no marriage ; and it is *consensus non concubitus* which, in the law of Scotland, constitutes marriage. It is therefore a total inversion

1813.

MACADAM
v.
WALKER, &c.

Ante, vol. ii.
p. 598.

1813.

M'ADAM

v.

WALKER, &C.

Fac. Coll.

Dec. 6, 1796.

of principles to construe the acknowledgment before the servants into a promise to be perfected by copulation or cohabitation. It is marriage *de presenti*, or it is nothing. Indeed it is even impossible to escape the ludicrous, were the subsequent *copula* to be required as an essential to complete a marriage, by acknowledgments between persons living in a state of cohabitation, as was here the case. I always considered Dobson's case a bad decision, where even an actual celebration was set aside: I would not allow the sacred forms to be sported with. I see evidence that Mr. Macadam asked Mr. Woodburn to dine with him; I do not believe it possible that he then intended to shoot himself. Mr. Cathcart has collected every circumstance to show that Mr. Macadam was affected with insanity: but it appears to me, after attending to every particular, that there is no ground to suppose that he was insane or incapable. There is reason to think that Mr. Macadam's death might be by accident, and the invitation to Mr. Woodburn is a confirmation of that. Mr. Macadam appears to have been a man of feeling, and could not overlook the shocking consequences of such a death; this idea is confirmed by the invitation to Mr. Smith. The fair probability of his death is, that it was by accident, but be that as it may, how far could a degree of melancholy affect the validity of his marriage? it could not. Had Mr. Macadam, at this time, been called out to discharge his official duty as a Deputy-Lieutenant and Colonel he would have felt nothing of such gloomy humours. Under that persuasion, I cannot bring myself to think that he was incapacitated to do what was in fact a duty, to legitimate his children, a benefit dictated by parental feeling, and highly favoured by the law of Scotland and by every law except that of England. Would you have voided his will, or his legacy as it is called, of the horse? Would you do that? You would not, nor would you have set aside a will by a person going to fight a duel, where the intention is that both will fall, and where generally the parties feel much agitation. You cannot, in such case, cut down even an unilateral deed, but far less so, where one enters into a contract with another, which, besides, was just and reasonable; the declaration in this case was an effectual celebration. I cast no reproach upon the witnesses; I never saw a collection of more respectable witnesses, and give full belief to their testimony. I cannot enter into any discussion about the propriety of medical language, in which the terms used may perhaps carry a very different signification from what they do to a lawyer. I see no expression *mala fide* uttered by the witnesses, or the slightest perjury among them."

LORD PRESIDENT.—"If I judged only of the *ex facie* appearance, I should be apt to draw the same conclusions with the majority of your Lordships. I remain, however, of my original opinion, that what is here called a marriage, is not, and ought not to be so. I refer to the cases of Collector Fullerton, Dobson, and Macinnea. I argued that last case, and think it not well judged. I do not go on that

case, as I did not see sufficient ground for the decision. When I view this case, with all its circumstances, I admit the declaration, but I look to see if it leads to the conclusion. Nobody can doubt of Mr. Macadam being serious, but I doubt very much whether there was any intention in him to make this lady his wife; the contrary is proven; he meant to make her his widow. I believe that the moment he made the declaration he never intended to hold her out as his wife. Of all the contracts, marriage is the most solemn, but I allude to no ceremony, as I admit that marriage may be constituted without any, and without a clergyman; this is quite a question of law. The facts are admitted, but the question is, Whether there is a legal marriage? What passed at the declaration is proof that there was no antecedent marriage; his settlements hold her out as his mistress, and are unaltered down to the last moments of his life; in these, this lady is styled a mistress, and her children illegitimate. He never intended to live with her, or to hold her out to the world as his wife;—It is remarkable that he wrote the codicil in the morning before he went out, the language of which shows me that it was amongst the last acts of his life; his conversation with the gardener is also remarkable, and he was in use to talk freely with him. Ramsay, when he took the shaving things to him, observed one symptom, that he could not be looked at; See what happened that morning; Ramsay, on seeing him, said he was ill, and left him; In what situation is Mrs. Macadam and the housekeeper? Was Mrs. Macadam in tears of joy? No, it was from something else. I am satisfied that this gentleman never meant to pass one moment of his life with this lady. There was no symptom of insanity in Collector Fullerton, and his acknowledgment was set down deliberately in writing. I can make no difference between this case and that of Collector Fullerton. I have marked some instances of insanity. It has been asked if this marriage could be set aside on insanity?—but my opinion is, that what occurred here did not *per se* constitute marriage, though it might have done so. If I saw an intention I would sustain it, but he only meant to make her his widow. Celebration by a priest is, *per se*, marriage, but in other cases it is not. Suppose Mr. Macadam's wound had not been mortal, it would have been the duty of his friends to have cognosed him, and to have put him in custody. These are the grounds of my opinion. The question at issue here is, is it a marriage, or is it not a marriage? I think it is not:—is it insanity or not? There is no room as to the facts of the case."

The LORD PRESIDENT then asked the opinion of the Lord Reporter.

LORD ROBERTSON.—"My opinion coincides entirely with that delivered by the majority of your Lordships."

On the second advising of petition, 4th March 1807, the Judges were divided as below:—

1813.

MACADAM
v.
WALKER, &c.

1813.	<i>To refuse the Petition.</i>	<i>To alter the Interlocutor.</i>
M'ADAM	LORD JUSTICE CLERK (HOPE.)	LORD PRESIDENT.
v.	" CULLEN.	" POLKEMMET.
WALKER, &c.	" ARMADALE.	" BALMUTO.
	" BANNATYNE.	" DUNSINNAN, and
	" HERMAND.	" WOODHOUSELEE.
	" CRAIG.	
	" GLENLEE.	
	" MEADOWBANK.	

On LORD DUNSINNAN's vote being asked by the Lord President, his Lordship said, That although he inclined to think that the marriage was not valid, still he felt very great difficulty in voting so.

Against these interlocutors, in which these opinions were delivered, the present appeal was brought to the House of Lords.

After hearing counsel, on 10th, 14th, and 21st May,

THE LORD CHANCELLOR ELDON said,

" My Lords,

" In a cause of such importance as this, I should have thought it my duty to crave time to consider it, before delivering my opinion thereon, if all my information on the questions it involves had been derived from the argument at the bar.

" There has been an elaborate and most able argument on both sides. The case is of so much magnitude, that one would wish not only to consider all the observations made, and the decisions quoted, bearing upon the subject ; but also to weigh the observations thereon, occurring to one's mind.

" Besides, the information received from the argument at the bar is well assisted by a paper drawn by Mr. Clerk, which must give celebrity to his name as long as that paper exists.

" But we have had a great deal more assistance upon this case. It is notorious that the doctrines contained in it have recently been matter of decision in some of the inferior Courts of this country, where inquiry has been made into the law of Scotland, as matter of fact, by the evidence of Scotch lawyers.

" Premising these observations, I think it right here to mark the expression, that when, in the consideration of this cause, I mention a contract *de presenti*, I mean something different from a promise, or contract *de futuro*.

" When I come to inquire into the validity of this marriage, the first question is, as to the sanity of the party ; Whether Quintin Macadam was of such sound mind, at the time, as to be able to form this contract of marriage ? If he was not, then this contract was invalid.

" Upon this point, my opinion is, that, upon the 22d of March 1805, he was of such sound mind and capacity as were perfectly sufficient to enable him to enter into such a contract.

1813.

M'ADAM

v.

WALKER, &c.

" This renders it unnecessary for me to discuss the very delicate point, if it be or be not competent to enter into the inquiry by evidence, Whether insanity was a disease prevalent in his family or not? and, Whether a collateral relation from this cause, destroyed himself? The true question here being, Whether Quintin Macadam was insane or not, it is unnecessary to enter into an inquiry as to any special cause for insanity, or into the matter of hereditary insanity, because, if you come to the conclusion that he was of sane mind on the 22d of March 1805, it matters not if he was insane at any other period of his life, or if any of his relations were so insane?

" If your Lordships affirm the interlocutors, it may be proper to come to a finding that it was unnecessary to decide this point.

" It is impossible to deny that, if he was insane in 1803, and if his insanity was of such a nature as might recur, this circumstance might be of weight, when the question was agitated, Whether he was sane or not on the 22d of March 1805? But if he was then sane, we may lay aside all inquiry into his antecedent state.

" I am not aware if there be any difference between the law of England and of Scotland upon this; There is no doubt in England, that if a person is sane at the time of his marriage, that contract will bind him like any other contract. The Legislature itself in this country was so careful upon this point, as to enact, that if a person, while under a commission of lunacy, contracts marriage, such contract shall be void. But this does not apply to other contracts, nor would it have applied to marriage, unless it had been so enacted.

" It is usual in this country to direct issues to try the validity of deeds or wills executed by lunatics. If the parties are of sound mind when such deeds or wills are executed, these will be effectual.

" A case lately occurred in the Court of Chancery, the name of which I do not recollect, but it will be remembered by the counsel at the bar,—where a young lady, near Hampstead, had been insane both before and after her marriage. She did not appear to me to be quite sane when examined by me. Her father had thought that it would benefit her to marry; and she was under no commission at the time. I directed an issue to try her sanity, and the jury found that she was sane at the time of her marriage.

" I remember another cause in which I was counsel; I shall not mention the names of the parties. A gentleman was put into a receptacle for lunatics, and continued there till his death. In that house he made his will, and, after his death, a question arose, if this will was good or not? His testament was found to contain a variety of provisions for a numerous family, with proper and prudent views. It also carried into effect those purposes of his mind, which he had mentioned before his malady had occurred. This WILL was sustain-

1813.
 ———
 M'ADAM
 v.
 WALKER, &c.

ed. It bears upon the present case, in so far as the act done on the 22d March 1805 appears to have been a purpose contemplated by Mr. Macadam as far back as 1800. In another point of view, it also bears upon it as to the question of insanity. I agree with Sir Samuel Romilly, that the stating a great many facts, and upon these facts, asking medical persons to say if these are not common in insanity, will not do; but I must admit that the question of sanity at the time of marriage, may be clearly connected with the other question, Whether, at the time a party conceived the purpose of marriage, he did so in connection with a purpose to commit suicide?

"A gentleman, whom many of us knew, during the delirium of a fever, conceived a most unfounded dislike to his brother, who had attended him with pious attention during his illness. He got well, but he still retained his dislike to his brother; and he made a will, and disinherited him. Lord Loughborough, who tried the question, directed the jury, that, if they were of opinion that the will was made under a morbid affection of the mind, it was no will. Lord Kenyon said, that this was too delicate to go to a jury, and that, in this way, if he disinherited his brother, they must always hold that he was under a morbid influence at the time.

"If we look at the case of this gentleman; it may be true that insanity will show itself in the state of his body; but we must inquire if his mind shows this insanity. Now, it appears to me, that if we look to the evidence of Woodburn, Hathorn, and the letters, it would be to destroy the intercourse of man with man, to say that he was not sane. I form this opinion upon the whole evidence.

"It belongs to God alone (I speak it with awful reverence) to know the cause of the suicide in this case.—We cannot come to the conclusion, from all that we know of this man's mind, that he was insane at the time.

"When I look at the notes that are given us of the opinions of the Judges in this case, I confess I don't distinctly understand a ground stated by the late illustrious President of the Court of Session (still living), that he considered Mr. Macadam's purpose to be to make Elizabeth Walker his widow merely; and this he takes as evidence of his insanity. In this part of the island, we do not understand how a person can be made a widow without having been previously made a wife.

* The names of these cases were given, but not very distinctly, as being Kim-mish and Thomas. (Note by D. R.)

Dalrymple v. Dalrymple, 1 Dodson's Reports.

"On the other question in this cause, the matter of the marriage, I have great satisfaction in knowing that we have all before us upon this point that we can possibly ever learn. Though we cannot, in this cause, have the evidence of witnesses upon the law of Scotland, we have had such evidence given in two late cases in the Court of Chancery.*

"In the recent case of *Dalrymple* there was a great deal of evidence given, though I can scarcely give the character of evidence to the depositions laid before the Court in that cause. Instead of the

dry way in which we do these things here, in these depositions they set forth all the text-writers and decisions, and give a commentary on both.

1813.

“ We are under this embarrassment in that case, that there are five persons (whom we cannot name), all of them of great professional knowledge, in favour of the validity of a marriage by the contract *de presenti*. There are three others whom I also greatly respect on the other side. Great weight, too, is due to the documents to which I have alluded as depositions. We thus find that there is a great difference in the legal opinions upon this point.

M'ADAM
v.
WALKER, &c.

“ Yet I must confess that I do not find the same difference in the judicial opinions that I do in the professional or extra-judicial.

“ It appears to be quite clear that the Canon Law was, upon this point, the basis of the law for all Europe. By that law, the contract *de presenti*, or the promise *de futuro cum copula*, made a marriage. The question is, how far this has been departed from ?

“ Do the text-writers in the law of Scotland contradict this law ? I think not. I have read Lord Stair again and again. I cannot construe him otherwise than that he distinguishes a contract *de presenti* from a promise *de futuro*. The contract *de presenti* is the same as a promise *de futuro*, if the law be as contended for by the appellant.

“ Mr. Erskine's language is exactly the same, and it is remarkable that he makes no question as to the proof by parole. He speaks of marriage by verbal promise ; and how can this be proved but by parole ?

“ I have also looked at the decisions again and again. I find in all of them, that a contract *de presenti* forms a present marriage, or *very matrimony*. As to the cases in the House of Lords, though they are not positive judgments on this point, I think they did not mean to trench upon what I understand to be the law. I shall not go through these.

“ If I find the law thus, I do not trust myself with the question, whether it be wise or prudent or not ; or if it ought to remain so. If it be bad, we cannot reform it, sitting as a Court of Appeal. But it is contended, if a contract *de presenti* forms a valid marriage, that there was no such marriage in the present case.

“ Let us consider the evidence as to this. The connection between the parties began in 1800. It occurred to this gentleman, it sometimes occurs to the minds of those who are acting profligately, that he might one day wish to marry her whom he was seducing.

“ He directed his agent, Mr. Smith, to prepare a bond for an annuity, and he requested him to take care, if this could be done, that it should be in full of jointure, in case she should become his wife.

“ In February following, the lady was pregnant, and Mr. Macadam writes again to his man of business, inquiring if the christening of the child, as a natural child, would endanger its legitimation in case of a future marriage with the mother. Your Lordships know that this had reference to a point in the law of Scotland, with re-

1813.

M'ADAM
v.
WALKER, &c.

gard to the effect of a subsequent marriage, upon the issue of the parties born before marriage.

"The man of business informs him that this will not endanger the legitimacy of his child; and he thereafter baptized her, as he mentions, with the christian name of his mother.

"Thus you see some kind of intention of marrying her from the very beginning of the connection, and you see a similar intention appearing on the birth of a child. It appears from the evidence too, that he treated her with great respect.

"At last he formed the purpose of marrying her: According to the parole evidence, he appears to have been under no previous promise to her. Mr. Oswald tells him of a report that he had promised to marry Elizabeth Walker; he answers, 'How could you think me such a fool as to promise what I could do every day?'

"Richardson, one of the four witnesses present at what is stated to have been the marriage, says, that a fortnight before this time, Mr. Macadam told him, that he would not marry Miss Walker, and that he should blow out his brains the day he married her. Yet, it is to be observed of this person's evidence, that when what is held to be the marriage, took effect, Richardson appears to have been under no alarm upon the occasion.

"The transaction took place under the circumstances which I shall state. I think that all the precedent facts and circumstances are to be taken into consideration. At first, when the connection is formed, he says it may end in a marriage; he directs his agent to make provision in his deeds with a view to this. At last he sends for certain of his servants and, in their presence, he says, 'This is my wife, and the children are my lawful children.' This last was a very important part of his purpose. Their hands embrace; and though all the witnesses do not exactly concur as to all that passed, yet there is no contradiction. It is quite clear that his intention was to make her his wife, and that, in point of fact and of law, he did make her his wife. From what appears of a conversation between him and the lady, and from what passed between them, there can be no doubt of her consent to this marriage.

"He was not content with three witnesses, and he sends for Mrs. Wyllie, and then the same ceremony and embracing of hands are gone over again in her presence. The question is, if this was not a marriage *de presenti*, (a promise for a future marriage would not do); and therefore, whether it was not a contract from this moment forwards—an act and deed *eo instanti*—making them man and wife, just as much as a celebration before the priest would have been? In such a case, a marriage by a priest would be undoubtedly valid, even though he had died in returning from the kirk.

"The conduct of both parties at the time proves what this meant. Their subsequent conduct proves this also. We see that Mr. Macadam says to Woodburn, 'Now, Woodburn, I am a married man like yourself.'

" So you see the conversation between the lady and Elizabeth Wyllie (who by the bye appears to have been a little nettled at what had happened) shows her view of the effect of this. She mentioned that Mr. Macadam would not delay it till Mr. Smith came, lest he should have dissuaded him from it. Then she accepts the compliments of the servants, in her change of state, as a married woman.

1813.

M'ADAM
v.
WALKER, &c.

" Is it therefore possible for your Lordships to have any doubt of what they meant, or that it was not clearly their purpose to contract marriage?

" Now, the question comes, Can this be proved by parole evidence? It is obvious that there may be danger in proving in this way; but this suggests two considerations, 1st, Does the law in such a case admit of this species of proof? 2d, If some legislative measure should not be come to upon this subject?

" I throw this last consideration entirely out of view at present; but, in regard to the first, I see no authority for saying, that a contract which may be completed in words or verbally, may not be proved by parole. In Scotland there is no regular form of words to be used in marriage, either by the parties or by the clergyman. I have not yet heard that a marriage, even *in facie ecclesie*, is such a matter of record as cannot be proved by parole testimony. How are all the marriages, not performed in the face of the church, but acknowledged to be good, to be proved, unless they be proved by parole? If this be a good marriage by the law of Scotland, I can see no reason why it should not be proved by parole.

" It was said, that in a case with a subsequent *copula*, or habit and repute, you might prove by parole, though not where the copula or sexual intercourse, or habit and repute has not followed, which was the case here, the gentleman having committed suicide immediately after the act; but it is easy to get rid of this difficulty. How could a marriage be proved, if a party died by the act of God before any sexual intercourse took place, in any other way? My own opinion is, that this was a marriage, and might be proved by parole.—I am not afraid of the danger of permitting such proof here; it is a danger which exists in many other cases of marriage in Scotland.

" I was much struck at first by what was urged upon the statutes of bigamy in Scotland: But Sir Samuel Romilly stated, in answer to this, what completely solved my difficulties; and it is clear that what was founded on these statutes applies to other marriages, as well as to marriages of this kind. In these, the evil is provided for as well as for this. But it would be too much to say, that, because there was no celebrator who could be punished under these statutes, that therefore this was not a marriage.

" Upon the whole, my opinion is, that there was a marriage duly had, entered into, and proved.

" We have seen to demonstration in this case, that our judgments, in matters of this nature, may be misunderstood. It may be right therefore to introduce into our judgment, in this case, such prefatory

1813. matter as will prevent the grounds on which it proceeded from being liable to misconstruction, and to show that we deemed it unnecessary, in this case, to make any decision on the very delicate point, of the receiving or not receiving the evidence of collateral insanity." (Here his Lordship read a minute of what was afterwards adopted as the judgment.)

M'ADAM
v.
WALKER, &c.

LORD REDESDALE said,

" My Lords,

" Concurring in the opinion which has been delivered, I shall only make observations on a few points connected with this cause.

" As to the alleged insanity, there does not appear to me to be the *slightest* proof of insanity at the time of the acts done, from which a marriage is inferred in this case.

" It was said that insanity was to be inferred from the fact of self-destruction ; but the law does not presume this, and accordingly it must be proved. In this case, there was no proof of insanity at any time of Mr. Macadam's life, except in a case of extreme irregularity from hard drinking, and this was removed by medicine, and immediately. I therefore put the insanity out of the case.

" The only question is, if what passed on the 22d of March 1805 was a legal marriage or not? It was said, the acts of the Scots Parliament inferred that there could be no such marriage as the present. The act 1551, which respects bigamy, was mentioned, and it was contended that *that* crime could never be proved in reference to marriages such as this, because it only applied to a case of a regular marriage. But this admits of the answer made by Sir Samuel Romilly, namely, that the words of the act are not sufficiently strong, to show that a marriage could not be contracted in any other manner than in the face of the church. The act 1503 shows that a marriage might be sanctioned by the Legislature, though not thus celebrated. The view which the Legislature had by the bigamy acts was, that a greater weight of evidence was necessary, in criminal prosecutions, than for civil purposes.

" It was said that the act 1641 inferred that there could be no marriage without a celebrator. But it appears to me to infer no such thing, it refers to the case of a marriage without a celebrator as well as *that* by a celebrator.

" The act 1698, referring to the act 1641, contains certain enactments as to parties clandestinely or irregularly married ; and makes the same distinction as is done in the former acts. It enacts, that both the celebrator and witnesses shall be liable to punishment.

" In my opinion none of these acts contains any authority for the position that a clandestine marriage cannot be contracted without a celebrator.

" The text writers appear to me to be all adverse to the argument

maintained by the appellant. (Here his Lordship read from Lord Stair.) Lord Stair considers the distinction between a consent *de presenti* and a promise *de futuro* as clear. The appellant's argument went to abolish this distinction.

1813.

M'ADAM
v.

WALKER, &c.

(His Lordship next read the quotation from Mr. Erskine.) "Mr. Erskine's opinion clearly is, that a marriage might be constituted by consent of parties, expressed before a magistrate, or before witnesses, and also by writing. In this passage, we find a clear distinction made between an act intended as a present marriage, and what was meant only as a promise *de futuro*, or espousals. The same distinction is made by Sir George Mackenzie. (His Lordship read the quotation from Mackenzie on the respondent's case.)

"In the decided cases, it appears to be clearly held, that if there was a consent to marry *de presenti*, the parties were from that moment to be considered as husband and wife. In the case of Mac-
lauchlane and Dobson, though no marriage was established there, it seems to be clearly acknowledged that this was the law. Unquestionably there was no *copula* in that case. The Court below, which held this to be a good marriage, so held it upon what passed between the parties. But the Court, which altered the first judgment, considered that what passed verbally between the parties was of the same import as the letters between them, and that they did not mean to live together as husband and wife. On account of this avowed resolution, it was held to be a promise merely, not a marriage.

Dec. 6, 1796.
Mor. 12693.

"It was contended in this case, that one of the parties never had the purpose to consummate the marriage. But if the woman thought the contract sincere, this could never alter the nature of the thing. But is there any evidence of this fact? I submit there is none. It is inferred only from the fact of his subsequent self-destruction, and from the evidence of Richardson. Did he mean to retract that the children were his legitimate children? I think not. When he said, 'I marry their mother, and they are the inheritors of my property,' there is not the slightest ground to think that he meant any secret reservation to the contrary.

"There is evidence that he thought it a complete marriage from what he said and did at Woodburn's. All the witnesses make a clear distinction between the time when he was going to be married and when he was married. He says to Woodburn, 'I am *now* a married man like yourself.' Does not this demonstrate that he thought himself completely bound?

The only remaining question is, if verbal declarations like these can be proved by parole? I have found my mind unequal to follow the argument on this point. How can the marriages put by Lord Stair, and the other text writers, in the passages before quoted, be proved but by parole? In Maclauchlane's case, there was a proof by parole; so there was in the case of M'Kie and Ferguson in 1782. What is contended for on the other side appears to amount to this, that

1813.
 ———
 M'ADAM
 v.
 WALKER, &c.

there can be no proof of an irregular marriage, except by writing in some form or other. In the case of a regular marriage in Scotland, there would have been no writing. According to the acts of Parliament, writing is not necessary. But it was said, the verbal declaration of a party could not be proved by parole. Mr. Erskine, in the passage before quoted, no doubt says, a marriage may be constituted by writing, but he also says it may be constituted by consent before a magistrate or before witnesses.

“ What then, upon the whole, is the ground upon which you can be called on to reverse the decision of the Court below ? The Court indeed was not unanimous, but, when I look at the opinions attributed to those who differed from the majority, I am not much impressed with them.

“ One of the judges thinks this verbal declaration a *mere promise*, which was not effectual. As to the nature of the obligation undertaken by Mr. Macadam, I cannot think this was a *promise*. It strikes me, that if there can be any marriage by a declaration before witnesses, this is such a marriage.

“ Where a declaration like this was preceded by cohabitation, matters can scarcely be said to have been *entire*. The parties were in very different circumstances from those of single persons. If nothing had been done, there would have remained as before, the contract ; but if they had children, the parties had acquired a different character, and the children a different character. I do not know if, in this case, the children could have enforced the contract, but I apprehend that, in the law of Scotland, there are cases where the children might enforce the contract.

“ The judge to whom I before alluded, proceeds to say, ‘ What is marriage but *consortium vitæ* ? And he infers, from the act of suicide, that Mr. Macadam never meant to fulfil this *consortium vitæ* ?

“ But how could Mr. Macadam alter the nature of the act by anything done subsequently ? There is no evidence, except the suicide, of a purpose that there should not be such *consortium vitæ*. But if this purpose had been defeated, by his death by the act of God, or by his having been murdered, would this have altered the nature of the contract ? Assuredly not. You must either hold that no irregular marriage can be good without a subsequent *concubitus*, or you must hold, that this was a real valid and complete marriage.

Nov. 13, 1795. “ Another judge says, that Mr. Macadam never meant to live
 M. 12690. with this woman, and that this was the same as the case of *Collector Fullerton* ; but I see nothing in this case from which to assume the fact, that he had such a purpose ; and even if he had, this was not an avowed purpose, and ought not to annul this act.

“ None of the judges below appear to have doubted of the competency of parole evidence in this case. It is impossible to infer from the law, as laid down in the text writers, that parole evidence would not be good in a case like this. Till the marriage act in this country, the whole proof of marriage might be by parole.

"On the whole, I perfectly concur in the opinion expressed by the noble and learned Lord. I have stated my views on this case without much order, as they occurred to me. There is no room for the question of insanity here. I agree also with his Lordship, that we ought to follow that mode, in framing our judgment, which he proposes."

1813.

WATT
v.
MORRIS, &c.

LORD CARLETON said,—

"I concur with your Lordships. There was much evidence of the sanity on the 22nd of March 1805, and none of insanity, except the act of suicide; but insanity is not to be inferred from this act alone; if it were so, there could be no such thing as *felo de se*."

24th May 1813.* The Lords find, That it is proved by Journals of competent evidence, that Quintine M'Adam and the House of pursuer did, on the 22d day of March 1805, intend to contract marriage, and become husband and wife, and did then forthwith contract matrimony and become husband and wife by declarations and acts made and done solemnly, seriously, deliberately, and publicly, before several witnesses for such purpose; and that it is also proved by competent evidence that the said Quintine M'Adam was, at the time of such declarations made and acts done, of competent mind and understanding, to contract marriage; that the evidence repelled, if received, could not have affected such evidence, and that therefore it is not necessary to decide whether such evidence ought to have been received. And therefore it is ordered and adjudged, that the said appeal be dismissed, and the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Henry Erskine, John Clerk.*

For the Respondents, *Ad. Rolland, Sir Sam. Romilly,
Geo. Cranstoun, Tho. Thomson.*

[Dow's Rep. vol. i. p. 32.)

JOHN WATT, Merchant in Dundee, *Appellant*;
JOHN MORRIS, Younger of Allanhill, and }
WM. WALLACE, Merchant in St. Andrews, } *Respondents.*

House of Lords, 10th May 1813.

INSURANCE—UNSEAWORTHINESS.

An insurance was effected on a vessel for £700, freighted

* The date at the beginning of this case is a misprint.

1813.

For the Respondents, *David Douglas, Fra. Horner.*

WM. ROBINSON of Banff, **CHAS. KER** of
Liverpool, **ROBERT AINSLIE**, Writer to the
 Signet, and **JAMES CAMPBELL** of Edin-
 burgh, and **GEORGE ROBINSON, W.S.**,
 Edinburgh, Underwriters on the hull and
 materials of the ship *Midsummer Blossom*,

WM. CLARK, Junior, of Wallsend, Esq., and } Respondents.
PATRICK IRVINE, WS., Mandatory, }

House of Lords, 15th May 1813.

INSURANCE—UNSEAWORTHINESS—CONCEALMENT.—A vessel was insured from Honduras to London. Soon after leaving the harbour she became leaky, and returned again to port. In doing so, she struck against a rock, and was lost. In an action for the sum in the policy, held there was no sufficient evidence of unseaworthiness. Reversed in the House of Lords, and held that the ship was to be taken as having been unseaworthy at the time of sailing on the voyage insured.

The appellants are underwriters on the hull and vessel, Midsummer Blossom, of which the respondent Clark is proprietor; the vessel was lost in Nov. 1801, on a voyage from Belize river in Honduras to London; and the question for decision was, if the ship was or was not sea-worthy at the time when she undertook to perform, or sailed on her homeward voyage? The risk assured was, "at and from Honduras to London." The vessel was thirty-five years old. She sailed from Belize harbour on 28th October.

Soon after sailing on her voyage she became leaky, and returned again to port. In doing so, she struck, and was lost. 1813.
ROBINSON, &C.

Action having been raised for the sum in the policy, the appellants stated this defence, that the vessel was not sea-worthy at the time she sailed on her voyage insured. They also stated, that her situation, while lying in the river Belize, in Honduras, had not been disclosed to them. v.
CLARK, &C.

The Judge-Admiral found, after various procedure, and production of documents, "That the ship or vessel in question, the *Midsummer Blossom*, was not sea-worthy when she sailed from Honduras on the voyage insured, therefore, finds the policy null and void, and assoilzies the defendants."

A reduction was brought of this decree before the Court of Session. It came before Lord Meadowbank, Ordinary, who pronounced an interlocutor, setting forth, that "there was no sufficient evidence, express or presumptive, that the vessel in question was not sea-worthy at the commencement of the risk," and reduced and decerned accordingly. On reclaiming petition, the Court adhered. And, on second reclaiming petition, the Court adhered.* Nov. 13, 1804.
May 16, 1806.
Nov. 26, 1806.

Against these interlocutors the present appeal was brought, with a special reference to another appeal, *Watson v. Clark, Dow*, vol. i. p. 336, which had reference to the cargo.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,—

"My Lords,

"I notice, first, in this case, what was *last* noticed by the re-

* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL.—"Sea-worthiness is to be presumed if the common attestations of carpenters are produced. The loss may have been occasioned by striking on the reef.

THE LORD JUSTICE CLERK (HOPE).—"It is enough that a ship is apparently in a state of sea-worthiness when she sails, and that the owners believe so. There was no opportunity of surveying and repairing at Honduras. The burden of proof is on the underwriters to show that she was not sea-worthy before she sailed on her voyage."

LORD MEADOWBANK.—"The vessel took in much water only after sailing; and here it was only partial leak, not total failure."

1813.

ROBINSON, &c.
v.
CLARK, &c.

pondents' counsel, namely, the matter of the premium. I am not aware that from the form of the proceedings before us, we can do any thing in regard to the premium. But if your Lordships shall be of opinion that the sea-worthiness was not made out, you may make your judgment so as not to prejudice this matter of the premium.

" My connection with a Court of Common Law was of short duration, and but few cases upon this point came before me during that period. I always felt the difficulty of cases of this kind, where the grounds of decision were founded on presumption, and not upon evidence. I thought it right, in such cases, to state the matter of law, only leaving the facts entirely to the jury.

" We sit here as judges, both of the law and the fact ; I am therefore called upon to state my views of both, which I shall do with all jealousy of my judgment.

" In every case of this kind, there is a warranty of sea-worthiness ; and sea-worthiness is always to be presumed till the contrary is shown. This may be shown either by evidence or by inference.

" It would be quite sufficient in this case, that the ship was sea-worthy at her departure from Honduras. If she was so, it matters not if she became not sea-worthy within an hour afterwards, for in that case the underwriters would still be liable. If the ship had been lost merely from damage sustained at sea, the *onus probandi* as to the non sea-worthiness would fall on the underwriters ; but if the ship, in a short time after commencing her voyage, is obliged to return without any such causes, the presumption is, that it was from causes existing before setting sail on her intended voyage, and from non sea-worthiness ; and the *onus probandi* in such a case would then be on the assured, to show that she was sea-worthy.

" It is laid down in all our books upon this class of cases, (though the great man who may be said to have formed the law upon this subject, is not always to be reconciled with the same principles), that ' if a ship sail upon a voyage, and in a day or two becomes leaky ' and founders, or is obliged to return to port without any storm or ' adequate cause to produce such an effect, the presumption is, that ' she was not sea-worthy when she sailed.'

" If this principle be right, and I doubt not your Lordships will concur with me in thinking it indisputable, let us examine and apply it to the circumstances of this case. I don't consider the age of this ship as a conclusive circumstance ; it may be of more or less weight according to the state of repair of the vessel, but it is not to be laid out of the question.

" The next circumstance that I notice is, the letter from the captain, dated at Barbadoes, 18th July 1801, in which he writes, ' She ' sails very fast and keeps tight ; we only draw her out twice in ' twenty-four hours.'

" Then we have the letter of the captain of the 27th September



1801, from Honduras. He writes thus:—‘The ship keeps very tight, she only makes about twelve inches in twenty-four hours.’

1813.

This was before starting on the voyage insured.

ROBINSON, &c.

“I cannot pay much attention to the affidavit of Captain Raimes bearing relation to this last letter. It does not follow from the circumstance there stated, that the ship, lying in Belize river, made only twelve inches water in the twenty-four hours, that, therefore, she must be sea-worthy. The age of the ship, and the circumstance of the water made in the outward bound voyage, were also to be taken into consideration along with the captain’s statement of the condition of the ship while in the river Belize.

v.
CLARK, &c.

“I next come to the protest of the 7th of December 1801, every word of which calls for particular attention.

(Here his Lordship read the same.)

“When a judge is obliged also to perform the part of a jury, he may be in danger of mistaking the language of seamen; but I see nothing that is doubtful. From my early habits, I probably know rather more of this than any judge on the Bench; had I been in a collier when the weather here mentioned occurred, we should have laughed at the idea of damage to the ship.

“We see from this protest, that, on the 30th of October, the ship, which on the 27th of September, while in harbour, drew twelve inches of water in twenty-four hours, was now drawing 240 inches in the same time. On the 31st October, the ship continues ‘making much water, pumping her every half hour.’ On the 1st November, there is evidence of a general understanding of the unworthiness of the ship, from the conduct of the seamen. I observe that the water kept increasing every day. On the third of November, they hove to to endeavour to find the leak; I don’t find this stated in the captain’s letter or affidavit. This must have been done to try if they could discover how the water was admitted into the ship. Whether this was found out or not we are left totally in the dark.

“On the 6th of November, the advice of all the hands on board is taken, and the ship turns back; at this time she was making upwards of forty inches per hour, being about 1008 inches in the 24 hours.

“The next thing is the letter of 9th December 1802, and in it he assigns no cause but the weather.

“The next document is the affidavit of the 24th of December 1802; this may be amusing reading, but it is irregular to admit this as evidence in a cause. This affidavit attributes the loss of the ship solely to the ‘thickness of weather.’

“In my poor judgment, the circumstance which occasioned the actual loss of the ship, in this case, has nothing to do with the true question between the parties. It is quite clear that, when the ship put about her bowsprit and returned, she was not sea-worthy.

1813. "The true question here is, where no cause is assigned for the ship's return, but those stated in the log-book and other documents, whether the conclusion is to be drawn, that she was not sea-worthy at the time of sailing?"

ROBINSON, &c.
v.
CLARK, &c.

"We are here in a case of hazard, but we are obliged to make up our minds; and I am convinced, for my own part, that the ship was not sea-worthy when she sailed; and I think that, if ever a case was laid which required the plaintiff himself to answer it, this is that case.

"In this case the assured was bound to let us know all he could inform us of. Should he not have told us the cause of the leak? We must think that it was competent to him to have said what, in particular, was the cause of the influx of water. We find that the hull of the ship was afterwards sold; they had an opportunity of examining it; but they say nothing about it.

It was urged upon this, that if there was any defect of evidence, the cause might be remitted, to enable the parties to give further evidence therein. But the facts do not appear to me to warrant this. It would, on the general principle, be dangerous in the extreme, after parties have seen where the *shoe pinched*, to send back a cause like this, where masters of ships have their own conduct or misconduct to account for, in order to allow them to supply that defect; and I therefore, on these grounds, move a reversal of the interlocutors of the Court of Session."

LORD REDESDALE and LORD CARLETON each spoke a few words, stating their concurrence with the opinion of the Lord Chancellor.

The Lords find, that the ship in question, the *Midsummer Blossom*, was not sea-worthy when she sailed from Honduras on the voyage insured, and therefore find the policy null and void. And it is therefore ordered and adjudged that the interlocutors complained of be reversed, and the defender assolized. And it is further ordered that the judgment be without prejudice to any claim of return of premiums which the respondents might have had at the commencement of this action.

For Appellants, *J. Clerk, Wm. Robinson.*

For Respondents, *F. Jeffrey.*

(Dow's Rep. vol. i. p. 259.)*

JAMES HAIG, Distiller at Lochrin, . . . *Appellant* ;
 WM. HANNAY, Merchant, Kirkcudbright,)
 and ALEXANDER YOUNG, Writer to the } *Respondents*.
 Signet,

1813.

 HAIG
 v.
 HANNAY, &c.

House of Lords, 17th May 1813.

SALE—PAYMENT OF PRICE—COMPENSATION.

Spirits were purchased by the respondent, Hannay, for which he granted a bill for £179. 16s. The respondent undertook to send a vessel for the spirits; and he was written repeatedly to requesting him to send the vessel. At last he sent a vessel for the spirits on 19th June, but she did not arrive until 18th July, by which time an additional duty had been imposed on spirits, and, in consequence of the appellant refusing to send the spirits, unless the additional duty were paid, the ship was delayed sometime in port at Leith. The respondent, in the meantime, had become bankrupt; and, when diligence was used on the bill, he suspended upon three grounds, 1st. That he had a claim of damages for not having sent the whisky on 19th June. 2d. That the master and owners of the ship had made a claim upon the suspender for the freight and demurrage, and that the appellant was liable to relieve him. 3d. Compensation for a decree obtained against him in the Admiralty Court, by the owners of the ship freighted, for freight which was paid by him. The Court of Session sustained this third reason of suspension. And this was affirmed in the House of Lords.

For the Appellant, *Wm. Adam, John Clerk, Geo. Cranstoun*.
 For the Respondents, *Sir Samuel Romilly, Fra. Horner*.

(Dow's Rep. vol. i. p. 255.)

JAMES HAIG, Distiller at Lochrin, . . . *Appellant* ;
 JOHN NAPIER, Esq. of Mollance, . . . *Respondent*.

House of Lords, 17th May 1813.

SALE—DAMAGES FOR NON-IMPLEMENT.

The respondent, who is a banker in Kirkcudbright, and a

* This for the year 1813 only.

1813. gentleman of considerable influence among his friends in that district, was applied to by the appellant, to lend him his aid and assistance in introducing his spirits into the market there. Mr. Napier did not deal in the spirit line, but consented, on the offer of the appellant, to take the forty puncheons offered, with a view of disposing of it among a few of his friends, and agreeing to give bill at three months from the date of invoice and bill of lading, "provided I have 2½ per cent. commission on the transaction, which I presume you will not consider an unreasonable commission for my trouble and risk. Shipped free on board at "Leith." The bargain was thus concluded. The appellant contended that, as his duty terminated by shipping the spirits on board at Leith, it was incumbent on the respondent to find a vessel. There were no regular packets plying between that port and Galloway, by which the appellant could send the spirits. He had looked out for such vessel, but could neither find such, nor any vessel at Leith which would take the cargo of forty puncheons. At last the appellant's traveller wrote the respondent, desiring a vessel to be sent for the spirits, this was agreed on. This vessel arrived in Leith, only after an additional duty had been laid on the spirits, and the appellant therefore declined to proceed with the bargain at the former price. In an action for implement and damages: Held the appellant liable in damages for failing to implement the contract of sale. Reversed in the House of Lords, and defences sustained, and defender (appellant) assolizied.

For the Appellant, *Wm. Adam, Geo. Cranstoun.*

For the Respondent, *Sir Samuel Romilly, Fra. Horner.*

(Dow's Rep. vol. i. p. 223.)

ROBERT SHARP, and JOHN MACKENZIE, Merchants in Glasgow,	} <i>Appellants;</i>
MESSRS. BURYS, LLOYD and COMPANY, Merchants and Calico-Printers in Manchester, and JOHN LANG, Writer in Glasgow, their Attorney,	} <i>Respondents.</i>

House of Lords, 17th May 1813.

SUBMISSION—DECREE ARBITRAL—SALE OF GOODS—QUALITY.

The appellants traded with America and the West Indies,

in cotton goods; and they purchased largely from the respondents. They gave an order for goods, to the extent of £6000, to be exported to New York and the West Indies; on delivery of these, they objected to a great part of the goods as of inferior quality. This dispute was submitted to arbiters; and the arbiters found in favour of the respondents. The appellants then brought a reduction of the decree arbitral. The Court of Session repelled the reasons of reduction, sustained the defence, and decerned. Affirmed in the House of Lords.

1813.

WEBSTER
v.
CHRISTIE.

For Appellants, *Wm. Adam, J. Macfarlane.*

For Respondents, *Sir Samuel Romilly, Fra. Horner.*

(Dow's Rep. vol. i. p. 247.)

THOMAS WEBSTER, Merchant in Dundee, } *Appellants;*
and ROBERT JAMESON, W. S. }
THOMAS CHRISTIE, Esq. of Phesdo, . *Respondent.*

House of Lords, 28th May 1813.

CAUTIONER FOR BANK AGENT — BOND OF RELIEF — FRAUD,
CONCEALMENT, AND MISREPRESENTATION.

This was an action brought by the respondent upon a bond of relief granted by the appellants to him as security for his nephew, agent for the British Linen Co.'s Bank at Montrose. The defence stated to the action was, that at a time when the respondent knew his nephew's affairs were getting involved, and when he knew he should suffer a loss under his cautionary obligations to the bank, he had applied to the appellants to relieve him; and that they had been induced by fraud, concealment, and misrepresentation in regard to the nephew's affairs, to grant him the bond of relief in question. The nephew became bankrupt, with £3422 owing to the bank. The Court of Session held that the appellants had failed to state relevant facts to infer that the respondent had been guilty of fraud. Affirmed in the House of Lords.

For the Appellants, *Thos. W. Baird, J. Greenshields.*

For the Respondent, *W. Adam, W. Macdonald.*

1813.

(Dow's Rep. vol. i. p. 39.)

BRUCE
v.
OGILVIE.

ROBERT BRUCE of Symbster, Esq. *Appellant ;*
WM. OGILVIE, Merchant, *Respondent.*

House of Lords, 31st May 1813.

PARTNERSHIP—LIABILITY—COMPENSATION.

The appellant was steward and factor to his uncle, John Bruce Stewart of Symbster, and he at sametime carried on some trade at Bigton in Shetland.

The respondent was engaged by him to assist him both in his stewardship and the trade. He was to have £10 a-year, and his board for his assistance in the former capacity, and was to have one-third of the profits of the trade, (he bearing a share of the loss in the same proportion) in the business of the trade.

The respondent managed the whole business of the latter partnership. At the termination of that partnership he brought the present action for £37. 17s. 3d., due him of wages, as assistant factor, and £63. 19s. due him on the partnership transactions. In defence, the appellant stated that the accounts, by which he brought out the balance on the partnership accounts, omitted to take into account a loss on tallow, bought by the respondent, which turned out so unfortunate a speculation, that a loss arose of no less than £330, all of which was paid by the appellant, so that when the pursuer debits himself with the third of this loss, instead of anything being due to him, the balance is against him: Held the appellant liable, and repelled his defences. Reversed in the House of Lords, and remit made to allow both parties a proof of the facts contained in their condescendence and answers respectively.

For the Appellant, *Geo. Cranstoun, Fra. Horner.*

For the Respondent, *Wm. Alexander, Robt. Corbet.*

FRANCIS REDFEARN, Esq.,	<i>Appellant ;</i>	1813.
WM. SOMMERVAIL and JOHN SOMMERVAIL, and ELIZABETH SOMMERVAIL and HELEN SOMMERVAIL, Representatives of George Sommervail, deceased, which said WIL- LIAM, JOHN, and GEORGE SOMMERVAIL, were the Brothers and Personal Repre- sentatives of Alexander Sommervail, late Merchant in Leith ; and CHARLES FER- RIER, Accountant in Edinburgh, as Com- missioner and Factor for DAVID STEWART and Co., late Merchants in Leith, and for the Representatives of the Partners of that Company,	<i>Respondents.</i>	REDFEARN v. SOMMERVAILS, &c.

House of Lords, 1st June 1813.

LATENT TRUST—JOINT STOCK COMPANY—PROPERTY IN SHARES
—ASSIGNATION INTIMATED.—A partner of a mercantile company had a share in a joint stock concern, which he purchased in his own name, and which appeared recorded in the books in his individual name. He assigned this stock, in security of a loan obtained from the appellant, which was duly intimated. After the dissolution of the mercantile company, the representatives and company creditors claimed the stock as a part of the company property. They alleged that the stock only appeared in the individual name of David Stewart, in trust for David Stewart and Co., the joint stock company not permitting partnerships to hold shares: Held that no latent trust or right in equity can defeat an intimated assignation, reversing the judgment of the Court of Session.

David Stewart, a merchant in Leith, stood owner or proprietor of a share in the Edinburgh Glass House Company at Leith. This share was purchased by him, and stood in the books of the company in David Stewart's name alone, and valued as his property at £2000. At the time this share was purchased by David Stewart he was a partner in the concern or house of Allan, Stewart and Co., which partnership had been thereafter dissolved, and a new one was formed between David Stewart and the late Alexander Sommervail, under the firm of David Stewart and Co., which partnership continued until the year 1796, when it was dissolved. The share of the Glass Company remained from the time of its

1813.
 ———
 REDFEARN
 v.
 SOMMERVAILE,
 &c.

original purchase, until the 23d day of August 1797, in the name of David Stewart alone. He acted as exclusive proprietor thereof, without any claim being asserted thereto by any person whatsoever.

Shortly previous to the 23d day of August 1797, David Stewart procured a loan of £1400 from the appellant, and, as a security for the payment of this loan, assigned to him in security the foresaid share or interest in the Edinburgh Glass House Co. at Leith. On the 23d August 1797, the foresaid bond and assignment was duly intimated to the manager of the Edinburgh Glass House Company (Mr. Archibald Geddes,) also a partner of the concern.

After this transaction had been concluded, Alexander Sommervail came forward, for the first time, to claim an interest and preferable claim over that stock, alleging that it belonged to the company of David Stewart and Co., of which firm he was a partner.

A multipoleinding was then brought to try which had best right to the stock, calling the trustee to the sequestrated estate of David Stewart and Co. (which firm had become bankrupt) as a party, as well as Alex. Sommervail. These parties also raised a reduction against the appellant, to set aside the bond and assignment of the stock as above mentioned, alleging that it only appeared in the name of David Stewart, as trustee for D. Stewart & Co., in obedience to a regulation of the Edinburgh Glass House Company. Thereafter Alexander Sommervail died, and the action was then carried on by the respondents.

Jan. 11, 1803. After some procedure the Lord Ordinary, of this date, pronounced this interlocutor: " Having considered the " mutual memorials for the parties, and whole process, find " that the purchase of the stock of the Edinburgh Glass " House Company in question, was made in the name of " David Stewart as an individual, and not in the name of " David Stewart and Co.; and that Mr. Stewart was not only " allowed to remain in the quiet and undisturbed possession " of the said stock, as absolute proprietor, for a considerable " time after he made the purchase, but for several months " after the copartnership of David Stewart and Co. was dissolved; therefore, and in respect it is not alleged that " the defender, Francis Redfearn, was in *mala fide* to accept the assignation under challenge, repel the reasons " of reduction, assoilzie the defender from the conclusions " of the action, and decern: and of new prefer him in the

“ multiplepounding to the fund *in medio* for payment of the sums contained in his interest produced ; and decern in the preference and for payment accordingly.” On several representations the Lord Ordinary adhered. But, on re-claiming petition to the Court, the Lords were pleased to pronounce this interlocutor: “ The Lords having resumed consideration of this petition, and advised the same, with answers thereto, alter the interlocutors of the Lord Ordinary reclaimed against, find the allegation of the stock in question having stood in the person of David Stewart, in trust for David Stewart and Co., relevant to exclude the assignment granted by David Stewart to the defender Francis Redfearn, and remit to the Lord Ordinary to proceed accordingly.” The appellant, in his turn, reclaimed, Nov. 22, — but the Court adhered.*

1813.

REDFEARN

v.

SOMMERVALES,

&c.

Jan. 18, 1805.

* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said,—“ I think the interlocutor of the Lord Ordinary wrong, *assignatus utitur jure auctoris* clearly applies to this case. The subject *in medio* is the stock in the Glass Work Company ; and in a competition between truster and assignee, the truster must be preferred, if the existence of the trust is sufficiently made out, which it seems to be. A declaration of trust, or circumstances inferring trust, do not require intimation. Had this subject been originally Mr. Stewart's, and made over by him to David Stewart and Co., to be held by him in future on their own account, this would have required intimation. But if it was a subject acquired by, and held from the beginning, in trust for them, this required no intimation to divest him, as it truly never was in him, but was merely a trust for the Company. No inconvenience arises from this principle, as every body knows, when he acquires a personal right of any kind—even personal rights of lands,—that he trusts the warrantice of his author, and not to the faith of any record.

“ At same time, a *bona fide* payment made to the person in whom the right nominally is, will be sustained, upon the common principle of *bona* and *mala fides*, and, therefore, in so far as dividends have hitherto been made upon their stock to David Stewart, or his assignee, these will be sustained till interpellation take place.

“ It is not a case of *bona* and *mala fides*, but of personal or real right.

“ As to the case of feudal rights, see the case of Ross, 31st Jan. 1792. In the case of different assignations, the first intimated prevails. In other words, it requires to divest the cedent. This was a regulation superadded contrary to the original and strict principle of law. But it supposes that the cedent had the full right in him, which is not the case here. *Vide* The York Building Company

1813. In consequence of this interlocutor, the cause went back to the Lord Ordinary, who, in compliance therewith, pronounced this interlocutor:—"The Lord Ordinary having
REDFEARN
v.
SOMMERVAILE, "heard what was stated, holds that the share of the Glass
 &c.
 Jan. 20, 1807.

about negotiable securities. Bills of lading are negotiable by the practice of merchants."

LORD HERMAD.—I am for altering. I consider which party, by attention to intimation, could secure himself. Sommervail, I think, could have so secured himself; but Redfearn could not. The trust might have been intimated to the Company, or a back bond entered in their books. It is a possible thing that a conspiracy to cheat third parties might so be executed. I wish to know how this would do in Change Alley, in a purchase of stock? The maxim *assignatus utitur, etc.* applies, as argued in the papers to the debtor's defences. The authorities in the books are to be explained in that way. As to lands, I wish to know if an infestment flowing from an author infest, is qualified with a latent back bond."

LORD JUSTICE CLERK HOPE.—"I am for adhering. The principle of the decision is, no one can transfer a property which he has not—either in heritage or moveables. Intimation merely puts the assignee in the cedent's place. Thus the right is complete against the cedent; but it does not make the right valid and good if it was bad in the cedent before. As in moveables so in lands. If I am infest on a disposition from an author infest, I am secure against the author, and any double rights he may make. But if the author had not the property;—if he was served heir to the prejudice of a nearer heir, will not my right fall with my author? Certainly.—unless prescription has secured it. As to stocks, they are regulated by special statute."

LORD CRAIG.—"I am for altering. I think that Sommervail is barred *personali exceptione*. It was his own fault that his name did not appear as joint owner in the Company books. He cannot therefore plead against this onerous *bona fide* intimation."

LORD BALMUTO.—"I am for adhering. The books of the Glass Company might have been inspected, for, in their books, it is seen that the price was paid by G. Stewart and Co."

LORD BANNATYNE.—" '*Nemo plus juris ad alium transferre potest quam ipse habet, assignatus utitur jure auctoris,*' is a good general rule. Intimation makes the right no better than before. It merely completes the transference. This is true also in real property, except where records interfere, but it does not protect against a radical defect in the right. I am therefore for adhering."

LORD MEADOWBANK.—"I am afraid to speak of this case with too much confidence. It goes deep into principle. The answers drawn by counsel are able. It lays a long train of judgments before us, which I fear to meddle with. I would wish a hearing in the

" House stock in question was not the property of David
 " Stewart as an individual, but that the same belonged to
 " the copartnery of David Stewart and Co., and was a fund
 " belonging to, and divisible among the creditors of that
 " company, and therefore decerns in the preference, and
 " against the said Francis Redfearn." And, on representa-
 tion, the Lord Ordinary adhered.

1813.

REDFEARN
 v.
 SOMMERVAILS,
 &c.

Feb. 11, 1807.

Since the above interlocutor was pronounced, George Sommervail died, and the respondents appeared as his representatives.

Against these interlocutors, so far as adverse to the appellant, he brought the present appeal, craving a reversal thereof, and an affirmance of the Lord Ordinary's interlocutor pronounced in his favour of 11th January 1803.

Pleaded for the Appellant.—Although it may be true that the share of the Glass House Co. in question was purchased with, or out of the funds of Allan, Stewart and Company, or of David Stewart and Company, yet it is not disputed that the same stood in the name of David Stewart only; that he received and gave discharges in his own name alone for the dividends and profits in respect of it; that he attended the different meetings of the Glass House Company, and exer-

case. But my general notion is, that a property may be so transferred by tradition, as not to be qualified by the author's latent obligations such as are in themselves personal, not touching the reality of the right. An ancient maxim has crept into practice, that an assignee is to be held as procurator for the cedent, and so liable for all exceptions. But if that is true, there was no occasion for the act 1621, for every personal creditor could have competed with the favoured assignee. However, the principle was established, that obligations *relative* to the *jus crediti* do qualify that trust. But I think this is wrong, unless the obligation is made real by diligence. The question therefore is, Is the obligation such as qualifies the right and *jus disponendi* in the holder? As to this case, I doubt if trusts, in any case, are to be held as real. I rather think they are in their own nature *personal*. By the rules of the Glass Company, shares of stock could be held by an individual only, and Redfearn had right to the share in question; and, upon principle, I hold that a conveyance of any subject, real or personal, being delivered, transfers the whole right, qualified only by intrinsic qualities, but not by late qualities."

Vide President Campbell's and Hume's Collection of Session Papers.

1813.
 ———
 REDFERN
 v.
 SOMMERVAILE,
 &c.

cised every other act of ownership of and over such share; and that no deed or other instrument was ever executed by him, declaring any trust of it in favour of Allan, Stewart and Co., or David Stewart and Company, or by which he, David Stewart, was in any manner restrained from the full and free disposal of the same. 2d. No intimation was made at the office of the said Edinburgh Glass House Co., or to or with the acting partner or manager thereof, previous to the intimation made by the appellant, of the aforesaid assignment to him of any interest, either legal or beneficial, claimed by the said partnership of David Stewart and Co. in the foresaid share of the Glass House Company. 3d. The appellant had not, at the time he advanced and paid the £1400, or when the foresaid assignment was made and executed, or when the same was intimated at the said office, any notice whatever that any person, other than the said David Stewart, had any interest in, or claim upon the aforesaid share of stock of the said Glass House Company; And, besides, the appellant could not, by any reasonable diligence or inquiry, have ascertained or discovered such latent interest or claim, if any there were. 4. If it be admitted that the share in question formed a part of the partnership property of the said David Stewart and Company, yet, as the appellant is advised, one partner may by law, without the consent of any of his partners, dispose of the partnership property for a valuable consideration; and the sale made by him will be good as against his partners, unless the person to whom it is made know that the transaction is fraudulent, and done with a view to apply the money produced by such sale to other than partnership purposes; and it has not been pretended that the appellant knew that such bond and assignment were fraudulent, or made with any improper view or design. The cases quoted by the respondents, and the authorities of Stair, Erskine, and Bankton, are totally inapplicable.

Pleaded for the Respondents.—By the law of Scotland, with the exception of privileged securities, and those which pass by indorsement, an assignee to property not connected with land is liable to every latent qualification inherent in the right of the cedent. The rules of the Roman law, *nemo plus juris ad alium transferre potest quam ipse habet*, *assignatus utitur jure auctoris*, directly apply to this; and, therefore, as the stock in question was not the property of David Stewart, but was held by him in trust for David Stewart and Company, no right to it granted by him can be effectual

to the prejudice of the creditors or partners of that company. Every person who transacts with the holder of a moveable subject, takes his risk of the possessor's title, and, in addition to reliance on his honesty, the law gives a claim of *warrant* dice against him.

1813.

REDFEARN
v.
SOMMERVAILE,
&c.

Precisely the same principle regulates the transmission of incorporeal personal rights. A factor sells goods for his constituent, and takes a bond for the price, payable to himself, the bond notwithstanding is the property of the constituent; A bond may be assigned by the creditor in it, and the creditor may, at the same time, take a back bond qualifying the right of the assignee, this back bond is effectual against every after transference by him; the assignee is like the holder of a corporeal subject lent or pledged to him. These principles must decide the present case, in which the stock was placed in the name of David Stewart, merely in obedience to a regulation of the Glass House Company. It being so vested, it gave no opportunity of deceiving others, which may not be alleged in every case where a latent defence or exception is founded on. And the doctrines laid down by *Stair*, B. i. tit. 10, § 16, *Erskine*, B. iii. tit. 5, § 10, and *Bankton*, B. iv. tit. 45, § 3, go to support this as the law applicable in this case.

After hearing counsel,

LORD REDESDALE said,—

“ My Lords,

“ This appeal relates to a certain portion of the stock of a Glass House Company, established at Leith, which stood in the name of David Stewart. It was said that this stock was originally the property of the mercantile company of Allan, Stewart and Company, and afterwards of the company of which Stewart and Sommervail were partners. This last company was dissolved in 1796.

“ In August 1797, Stewart applied to Redfearn for a loan of £1400, and proposed to give in security this Glass House stock. This was agreed to; and, accordingly, Redfearn took his bond and assignation of the stock in security, in the following terms. (Here his Lordship read the quotation of the assignation in the appellant's case.)

“ This assignation was duly intimated to the Glass House Company; and, if the stock was the property of David Stewart, this assignation would have vested it in Redfearn for all the purposes intended by the deed.

“ Sommervail sometime afterwards claimed the stock as part of the partnership funds of David Stewart and Co.; and the Glass

1813. House Company thereupon instituted a multiplepinding to see who was truly entitled to it.

REDFEARN
v.
SOMMERVAILS,
&c.

" In this process, the Lord Ordinary, on the 29th of June 1801, pronounced this interlocutor. (His Lordship read it.) After this interlocutor was pronounced, a representation was offered by Sommervail, stating that the stock belonged to David Stewart and Co.; the Lord Ordinary directed parties to be heard on this, but Sommervail did not appear, and decree in absence went against him.

" Sommervail afterwards brought an action of reduction for reducing the assignation granted to Redfearn. This was remitted to the Lord Ordinary (Craig) before whom the multiplepinding depended. Sommervail having afterwards died, his representatives were made parties to the action.

" On the 11th of January 1803, the Lord Ordinary pronounced this interlocutor. (Here his Lordship read the same). The Sommervails presented a reclaiming petition against this interlocutor, and, on the 18th of January 1805, the following interlocutor was pronounced. (Here interlocutor read.)

" The cause thereupon went back to the Lord Ordinary, and, on the 23d of June 1807, this interlocutor was pronounced by his Lordship. (The same read.) And his Lordship, on the 20th of February 1807, adhered to that interlocutor.

" The *extent* to which this sentence goes, as to the reduction of the assignation, does not very clearly appear, whether it was meant to be an absolute or a limited reduction. If it was meant to be absolute, it was unfounded, in so far as David Stewart's interest in the stock, as an individual, was concerned. But whatever qualification may have been intended, I conceive the interlocutors appealed from are not founded on the principles of law applicable to this case.

" It is clear, that by the law of Scotland, an assignation intimated, denudes the assignor of all right in him to the thing assigned. If the debtor has any thing which is good against the debt, THAT is good also against the assignee.

" I have seen no case, nor dictum of any writer, which goes the length of saying, that an assignation duly intimated could be defeated by any latent right in equity such as that claimed for David Stewart and Co. in this case. The case seems to be altogether a new decision, and on new principles. We should not be inclined to ratify these to the prejudice of a *bona fide* assignee without notice, unless we are bound so to do. It appears that the judges thought the former decided cases so applicable to this, that they found the principle on this case. .

" There is nothing to this extent in the passages cited from Lord Stair in the respondents' case. (Here his Lordship read the same.) When Lord Stair says, that all exception against the cedent would be good against the assignee, *even compensation itself*, this sufficiently

explains his meaning. It is the business of the assignee to learn the true condition of the cedent, as between the debtor and him.

"The authority of Lord Bankton is of the same description. (Here his Lordship read the quotation from Bankton from the respondents' case.) It is manifest that this applies also to a defence against the demand. This, if good against the assignor, would be good against the assignee.

"Mr. Erskine goes to the same effect. (The quotation from Mr. Erskine read.) All these are cases of exception to the demand in the person of the assignor; none of them, therefore, are applicable to this subject. The argument on the decided cases is to be answered in the same way. It is not necessary to enter into them.

"Some argument was used in this case, as to the law in the case of stolen goods; and the case of a horse stolen, and not sold in market *overt* was founded on. But the vendor of stolen goods has no title to them except what he makes by a sale in market *overt*.

"The goods here were Stewart's, but bound, as it is said, by a secret obligation, which could not be known unless he intimated it himself. Conceiving that there is nothing in the text writers, nor in the decided cases, to found the present judgment, I find the law of Scotland as to assignments clearly against the present decision.

"The right of Sommervail was merely one to compel an assignment to be made for the purposes of the partnership of which he was a member; the Glass House Company did not permit stock to be held by a partnership, and he could only claim that it should be assigned to a common trustee.

"By the law of Scotland, an assignment not intimated, will not be good as against an assignment duly intimated, though posterior in date to the first. In the same manner, an arrestment is good against an assignment not intimated.

"The rule of law is, that assignments are preferable according to the dates of their intimations. This clearly explains the meaning of the maxim, '*Utilitur jure auctoris*.' The author is not fully divested without intimation; then, when a first assignment is not intimated, and a second assignment is granted with intimation, the second assignment, in that case, will be preferred. The reason is, because the assignee could have no better right than his author. This demonstrates, that the principle so much relied on does not apply to the present case.

"An argument was used on the case of an executor assigning a debt belonging to his testator. But there, every person must know that there was a trust, and that he would be bound by it.

"In my opinion, Sommervail can be in no better case than one who had an assignment not intimated. But Redfearn's assignment was intimated, and therefore to be preferred. It would be absurd to say that Sommervail could be better with this right which he

1813.

REDFEARN
v.
SOMMERVAIL,
&c.

1813.

REDFERN
v.
SOMMERVAILL
&c.

claimed, than if he had had an actual assignation, but not intimated.

" Upon the whole, I am of opinion that the interlocutors complained of ought to be reversed, and that the interlocutor of the Lord Ordinary, of 11th January 1803, which decided in favour of the appellants, ought to be affirmed.

LORD CHANCELLOR (ELDON) said,—

" My Lords,

" After what has been stated, I shall not enter into this case at large, but I must make some few observations upon it.

" The question here arises as to the right of a company carrying on business in Scotland to a certain portion of the stock standing in the name of an individual member of the firm, and which, according to the rules of the company in which the stock was vested, could only stand in one name. The question comes before us, as to the right of the first mentioned company, in competition with an individual who had obtained an assignation of this stock, and his assignation duly intimated.

" Mr. Leach objected to our looking into the articles of partnership in this case; but when we were discussing what was the law of Scotland as to personal rights, it was absolutely necessary to see whether the right of which we were treating was of a personal nature or not.

" Upon looking into those articles, I find that the partnership began in 1756, with a certain number of shares, for a term of twenty-one years; and afterwards, for an indefinite term, if eight partners agreed. The property of the company was both heritable and moveable—they had houses, stock in trade, and debts.

" The portion of stock of the Glass House Company, which is the subject of the present question, could therefore only be considered as wholly personal in this way, that every individual partner had a right to withdraw from the partnership, and to demand the value of his stock.

" The competition here is between one claiming the stock under an assignation intimated to the Glass House Company, who were the debtors; and those claiming as the *cestui que trusts* of the individual who granted the assignation.

" The case may almost be decided upon this point. Even if the trust had been declared, the Glass House Company might have said, We have nothing to do with your bargains in any other partnership concern, only one person can be joined with us; an assignee must be approved of by our Company, and nothing can be vested in him but a right to call for the value of the stock.

" The question here is not one depending between the debtor of Stewart and the assignee of Stewart; but between a creditor of

Stewart and those claiming under an alleged equity in the person of Stewart. This disposes of the argument of the case of an assignation by an executor. In such case, the assignee must know that a trust existed, and was bound to look to it; an assignee could have no such knowledge here. It was a latent trust, of which the debtors, the Glass House Company, knew nothing. What is said about its appearing from the books of that Company, that part of the price was due by Stewart and Co., appears to prove nothing as to their knowledge of any equity in Stewart.

1813.

REDFEARN
v.
SOMMERVAILE,
&c.

“How can you apply the doctrine of the decided cases here? The ordinary cases are well known. A grants a bond to B, and B assigns it to C. If any set off, or ground of compensation, was good to A against B, it will also be good to A against C, the assignee, because *utilur jure auctoris*. And what is the hardship of this? Absolutely there is none. For C might have known by inquiry, and with common caution, what objections were competent to A.

“The same rule applies as to back bonds. If a back bond is granted, the assignee of the subject to which the bond relates is bound to take notice of it.

“I looked with anxiety into the cases, to see if an assignation with an intimation had ever been defeated by a right in equity such as this; but I found none such. I think the doctrine, in the present case, as it stands decided by the Court below, goes the length of saying that the shares of the stock of a mercantile company in Scotland cannot be assigned. How could any assignee protect himself, by any diligence or inquiries, against a claim like this, which was absolutely latent? If this doctrine were confirmed, I don't see how any person could be in safety to purchase property of this kind in Scotland.

“But if this be the law, we have nothing to do here with any inconvenience that may attach to it. It is only the Legislature that can give a remedy in such case.

“But I find nothing in the text writers on the law of Scotland, or cases, which should place this latent right in equity higher than if there had been an equal assignment. I therefore concur in the opinion that the judgment should be reversed.”

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby reversed; and it is further ordered that the original interlocutor of the Lord Ordinary of 11th January 1803 be, and the same is hereby affirmed; and that the defender in the action of reduction be assoilzied.

For Appellant, *J. Johnson*.

For Respondents, *Sir Samuel Romilly, David Douglas*.

1813.

BROWN, &c.

v.

SMITH, &c.

(Dow, i. p. 349.)

MESSRS. BROWN, HUSON, MACGAULEY, and Co., Liverpool Merchants,	} <i>Appellants ;</i>
ALEX. SMITH and Others, Underwriters on the ship <i>Friendship</i> , and her Cargo,	
	} <i>Respondents.</i>

House of Lords, 2d June 1813.

INSURANCE—RIGHT TO ABANDON AS FOR TOTAL LOSS.

Action was raised on a policy of insurance upon the ship *Friendship*, insured “to the port or ports of discharge, sale, and final destination in the British or Foreign West Indies and America,” which words, the appellants contended, in the case of a ship engaged in the slave trade, were customary, and understood to cover a voyage from port to port, in search of a market, till the object of the voyage is completed.

The vessel, in consequence of the mutiny of the crew who were guilty of piracy and murder, was taken possession of by them, and the object of the voyage was thereby defeated; but the boatswain and two others, who remained honest, pretending to gratify the mutinous part of the crew by steering for Cayenne, while they made direct for Barbadoes, on arrival there handed the ship and crew over to the government authorities.

The master, with seven of the crew, had been put on shore in the whale boat, but the master procured passages, first to St. Thomas, and then to Barbadoes, where he found the *Friendship*, with nothing but the hull and rigging of the ship remaining. The cargo and stores were here sold by the King’s agent before his arrival; and he saw at once that the intended trade to the coast of Africa was thus defeated. The appellants gave notice that they intended to abandon as for a total loss. The ship was then sold for the insurers.

In an action before the Judge Admiral, he found the appellants entitled to their demand. Of this decree a suspension was brought to the Court of Session, in which they pleaded, as to the ship, that as she sustained no injury whatever, however much the cargo may have been damaged, and the trading voyage therewith defeated on the coast of Africa, yet as the vessel arrived at Barbadoes in a better condition

than when she set out, there were no grounds upon which the appellants were entitled to abandon the ship as for a total loss. 2. In addition to the plea that the ship was not lost, and could not be abandoned as lost, it was further maintained that though the appellants had been in a situation to abandon, yet that they had not abandoned *tempestive*. Held in the Court of Session that the appellants were not entitled to abandon as for a total loss, and to recover accordingly. Reversed in the House of Lords, and ordered that the decree of the Court of Admiralty be affirmed, which decided that the appellants were entitled to abandon as for a total loss,—the object of the voyage being totally defeated.

1813.

CRAIGDALLIE,
&c.
v.
AIKMAN, &c.

For the Appellants, *V. Gibbs, J. A. Park.*
For the Respondents, *M. Nolan, Wm. Erskine.*

(Dow, vol. i. p. 1.)

JAMES CRAIGDALLIE and Others, *Appellants ;*
The Rev. J. AIKMAN and Others, *Respondents.*

House of Lords, 16th June 1813.

PROPERTY OF CHURCH—SEPARATION IN RELIGIOUS BODY.

This question, as to the right to possession of the meeting house and session house belonging to the Society of Burgher Seceders of Perth, was raised on the occasion of a split in that body, in regard to the formula of their church as respected the power of the civil magistrate. The appellants were the body who separated themselves, but, contending that they adhered to the original doctrines and formula of the Seceders' body, which were identical with those of the established church, and were therefore entitled to possession, while the respondents were parties who had altered, or were inclined to modify the formula on this head. The Court of Session were of opinion that nothing had been done to alter the formula by the respondents, and confirmed them in possession of the meeting house, &c. On appeal to the House of Lords, the case was remitted for reconsideration. *Vide infra*, (second appeal.)

For Appellants, *Ar. Colquhoun, Wm. Adam.*
For Respondents, *Sir Samuel Romilly, James Stephen,*
Alex. Maconochie.

1813.

EARL OF
MORTON.
v
STUART.

GEORGE, EARL OF MORTON, *Appellant*;
JAMES STUART, Esq., Younger of Dunearn, *Respondent*.

House of Lords, 21st June 1813.

SERVITUDE OF ROAD—PRESCRIPTIVE POSSESSION—CONDESCENDENCE.

—An action was brought by the appellant of immunity from a servitude of two roads, claimed by the respondent, through the appellant's property. The respondent was ordered to give in a condescendence of what he claimed as servitudes, and by virtue of what right or title he was prepared to maintain his right to them. When given in, the condescendence was objected to, as not stating the nature or origin of the servitudes, or the ends or purposes to which the roads were put; and he proposed to establish the servitudes by prescriptive possession of other parties, different from the respondent and his predecessors and tenants; Held the condescendence relevant to go to proof. Reversed in the House of Lords, and case remitted to give in a new condescendence.

Dec. 11, 1806. The appellant brought a declarator of immunity from a servitude of two roads, claimed by the respondent, through his property, in which action the Lord Ordinary ordered the respondent to give in a condescendence of what he claimed as a servitude, and of what he offered to prove in regard to the same.

In terms of this order, the following condescendence was given in:—

“ 1st. That the road from Easter Aberdour, which is
“ commonly called the Fishergate, leaves the south street of
“ Easter Aberdour, between the west gable of a house be-
“ longing to John Anderson feuar in Aberdour, and the east
“ gable of a house presently possessed by Mrs. Lochty; that
“ it enters a park or field belonging to the pursuer at the
“ south-east end of the lane running in that direction from
“ these gables; and that, after passing about half-way along
“ the east or upper side of that park, it inclines in a south-
“ westerly direction through the middle of it to the harbour,
“ which lies at its south-west end; and that the road lead-
“ ing to the Whitesands Bay leaves the said road to the
“ harbour about the middle of the east, or upper side of
“ that park, to a gate at a farm steading belonging to the
“ pursuer, called the Teind Barns; and from thence in a
“ south-easterly course to the bay.

2d. “ The defender offers to prove, by parole testimony of

" witnesses who have access to know the fact, that these
 " roads have been uninterruptedly used; the first, namely,
 " that to the harbour, as a road for foot passengers, persons
 " on horseback, and carriages; and the other, to the White-
 " sands Bay, as a road for foot passengers, by all the pro-
 " prietors of grounds or houses situated on the east side of
 " the rivulet called Aberdour Burn, and lying in the parish
 " of Aberdour, and particularly by the defender and his pre-
 " decessors, (to whom the description applies), for a period
 " beyond the memory of man."

1813.

EARL OF
 MORTON
 v.
 STUART.

3d. He offers to prove, " that when the pursuer placed
 " gates on these roads several years ago, he did not attempt
 " to prevent their being used as before; and, indeed, he at
 " that time showed his own conviction that he could shut
 " up neither, at least as a road for passengers on foot, by
 " leaving an opening for passengers, on the west side of the
 " northmost gate, stepping-stones on the west side of the
 " two middle gates, and a wooden ladder on the east side
 " of the southmost gate." And,

4th. He offers to prove, "that the pursuer has lately erected
 " a high gate, which he keeps locked, at the south-east end
 " of the lane before mentioned, and a strong stone and lime
 " wall on the south-west side of the park or field before
 " described; by which illegal operations the said roads are
 " completely and effectually shut up."

The appellant objected to this condescendence being ad-
 mitted to proof, as it did not state the nature or origin of the
 pretended servitudes, or the ends or purposes of them; while,
 on the other hand, it proposed to establish the respondent's
 right of servitude, by the alleged possession of *other parties*,
different from the respondent or his predecessors, and pro-
 prietors of tenements no way connected with the lands
 of Hillside. He therefore submitted to the Lord Ordinary
 that this condescendence could not be admitted to proof,
 and that a new condescendence ought to be given in, stating
 clearly and explicitly the following points:—

1. Whether the pretended servitude was constituted by
 grant or by prescription; and what length of possession he
 undertook to prove in either case?

2. What were the ends and purposes to which the pre-
 tended servitude roads had been and were to be applied;
 and whether the use of both, or either of the roads, is for
 his own personal convenience and pleasure, or for any benefit
 connected with the land of Hillside as dominant tenement?

1813.

EARL OF
MORTON
v.
STUART.

3. What possession the respondent and his predecessors, proprietors of Hillside, and their tenants, have had of the pretended servitude roads, without reference to any possession that may have been had by the other proprietors of grounds or houses situated on the east side of Aberdour Burn?

4. Whether the stepping-stones, ladders, stiles, or other access to the appellant's different fields and inclosures were made, in any instance, at the requisition or desire of the respondent or his predecessors; and what those instances were?

Jan. 13, 1807.

The Lord Ordinary pronounced this interlocutor: "Having considered the condescendence for the defender, with the answers thereto: and being of opinion that the condescendence implies sufficiently the nature of the defender's claim to the roads in question, as not to be defended on any existing grant known to the defender; that the defender, in giving in the condescendence ordered, is nowise called on to assign any particular uses for an access to the sea-shore, which is *juris publici*; that the general use of the road in question, by the feuars of Aberdour, may be very material to ascertain, in leading any proof in support of the defender's claim in behalf of Hillside, to the same benefit; and that, as to the circumstances attending the erection of gates, ladders, stepping-stones, it will be open to both parties to ascertain them by proper interrogatories to the witnesses to be adduced; before answer, allows to the defender a proof of the facts averred in the condescendence, and to the pursuer a proof of the history detailed in the answers, if he inclines to bring it, and to both parties a conjunct probation: and grants commission and diligence to the Sheriff-depute of Fife, or James Glassford, Esq., Advocate, to take the said proof." On two representations against this interlocutor by the appellant, the

May 12 and
May 26, 1807.

Lord Ordinary adhered. And, on reclaiming petition to the Court praying the Lords to alter the above interlocutor, the Court, of this date, refused the prayer of the petition, and adhered.

July 11, 1807.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. The respondent originally claimed right to the use of the roads in question, as proprietor of the estate of Hillside, that is to say, he claimed a right of servitude in favour of the estate of Hillside as the dominant tenement, over the barony of Aberdour as the servient

tenement; and it was expressly against this private claim that the appellant's action of declarator was directed. But, in answering the appellant's first representation, the respondent seemed to be desirous of evading the action as it had been brought, by shifting from his original claim, and contending that the two roads claimed were public roads. Therefore, even supposing the respondent to have been serious when he alleged, after the cause had sometime depended, that the roads in question were public, such allegation was altogether incompetent, and could not be entertained under the present action. If the respondent really means to lay aside his original pretensions to a right of servitude, and to insist for those roads as public, this, which would be a new and quite different case from the one really at issue, may, if he pleases, be tried in a separate action at his own instance, in which, both the correctness of the statement, and his title to maintain it, may be fairly discussed. But, 2. In the present suit the respondent, in his condescendence, has not offered to prove the whole of those circumstances which, by the law of Scotland, are requisite in order to constitute a servitude in favour of one tenement over another. 3. As a mere question of immunity from an alleged servitude, the condescendence given in by the respondent was objectionable, inasmuch as though every part of it, except that which relates to the possession of the respondent himself and his predecessors, as proprietors of Hillside, should be proved, such proof would have no effect in establishing the right of servitude claimed by him; on the other hand, should he fail in the whole of the proof of use and possession, except that of his own and his authors' use and possession, such failure would not in the least invalidate the right to the servitude so established by the use and possession of himself and his authors. 4. Personal servitudes are not recognised by the law of Scotland: and, from any explanations hitherto given by the respondent as to the uses of the servitude claimed by him, it appears to be in the nature of a personal servitude, and altogether different from a real or predial servitude, which is well known and accurately defined by the legal authorities applicable to this subject. Vide Ersk. B. iii. tit. 9, § 33; Craig, Lib. 1. Dieg. 15, § 15; Stair B. ii. tit. 1, § 5; Bank. B. i. tit. 3, § 4. Again, Stair, B. ii. tit. 7, § 1. And Erskine says, B. ii. tit. 9, § 3, "That a servitude by prescription is limited by the measure "or degree of the use had by the acquirer of it, agreeably

1813.

EARL OF
MORTON
v.
STUART.

1813.

 EARL OF
MORTON
v.
STUART.

“ to the rule *tantum prescriptum quantum possessum*.” Therefore, nothing can more satisfactorily show that the only relevant possession in this case, is the possession of the respondent or his predecessors ; and that the possession of the feuars of Aberdour, proprietors of distinct tenements, has no connection at all with the question at issue.

Pleaded for the Respondent.—The facts offered to be proved in his condescendence are undeniably relevant ; in other words, they must, if established by proof, serve as a complete legal defence against this action of declarator. The purpose of the action was to obtain a decree, declaring the whole barony of Aberdour free from the burden of a servitude in favour of the proprietors of Hillside ; and, against such an action, it is sufficient to aver, as the respondent has done in the second article of his condescendence, that the roads in question, passing through the barony of Aberdour, have been uninterruptedly used by the inhabitants of the village, and by him and his predecessors, for a period beyond the memory of man. This is a distinct and specific allegation of a servitude by prescription, which may be proved by parole testimony, and indeed, from its nature, is only capable of being so proved. 2. Yet the appellant contends that the respondent was bound to explain the purposes of these roads, during the previous possession, but there is no authority for this laid down in the law-writers ; and the Lord Ordinary has rightly found, in regard to this, that he “ is nowise called on to assign any particular uses for any access “ to the sea-shore, which is *juris publici*.” Even if he admitted that the chief object was bathing, this would not assert a right to a servitude merely *personal*. His allegation is, that he and his predecessors have travelled to a particular bay for time immemorial, through the appellant’s property, which is a servitude of way. 3. Nor is the proof of possession of the feuars of Aberdour inadmissible in establishing this right of way, because, as the Lord Ordinary has said in his interlocutor, “ The general use of the road in question, by the “ feuars of Aberdour, may be very material to ascertain, in “ leading any proof in support of the defender’s claim in behalf “ of Hillside to the same benefit.” In addition to this, the respondent would observe, that, according to his statement, which, in a question of relevancy, must be held as true, the use of these roads was enjoyed uninterruptedly by a certain description of persons, and he, as included within that description, must be entitled to vindicate his right. The

right of the public to these roads may be inferred, from the general and immemorial use of them by the proprietors of the subjects to the east of Aberdour Burn; but, could it be maintained that these proprietors are not, as such, entitled to vindicate that use, because the public would be benefited by their succeeding in the claim? And if these proprietors are entitled to make their right effectual, shall the same privilege be denied to the respondent, who is the most considerable of them? The objection of the appellant proceeds on a mis-statement or misapprehension of the nature of the respondent's right. The right is claimed, not as a servitude attached to the lands of Hillside exclusively, but as a common benefit pertaining to the whole lands and houses to the eastward of a stream separating Easter and Wester Aberdour. The possession of the other villagers may therefore be pleaded upon by the respondent; and, besides, it must be obvious, that if the possession has been universal, the appellant has no interest in bringing an action of immunity against any one individual. On this hypothesis, every proprietor of lands and houses has a right to demand that the road shall be kept open; and, of consequence, the proof allowed in the Court of Session is of importance, 1st, In establishing the right claimed by the respondent; and, 2d, In showing that the appellant has no interest in the issue of the present action.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

“ My Lords,

“ In this cause there arise two questions, 1. Whether the Court of Session should not call upon Mr. Stuart to state the purposes for which he claims the roads in question? 2. Whether he ought not to be confined to proof of possession had by himself and his predecessors, proprietors of the lands of Hillside?

“ On the first of these, I have no conception that the interlocutor of the Lord Ordinary, of the 11th of December 1806, ordaining the respondent to give in a condescendence of ‘ *what he claimed,*’ could be held to mean less, than that he should state the nature of the servitude claimed.

“ This claim being for a right to certain roads through the appellant's property, the proof might show a right to them for general purposes, for only one limited purpose, or for a variety of specific purposes. The respondent stated that he claimed two roads of different kinds, one a foot road, and the other a road for horses and

1813.

EARL OF
MORTON
v.
STUART.

1813.

 EARL OF
MORTON
v.
STUART.

carriages; but if the argument at the bar was well founded, there was no occasion for him to have said even so much in his condescendence.

"It was said that the road claimed to the harbour of Aberdour belonged to the proprietors of tenements to the eastward of Aberdour Burn, and that this being a right of road to a public harbour, it was sufficient to condescend upon the *terminus ad quem*; but I cannot accede to this doctrine. It was not said that this was a public road; but that it belonged to the proprietors of certain tenements. As such, it might be for particular purposes only—such as for bringing to these tenements commodities landed in the harbour; but this is quite different from a road to be used by all his Majesty's subjects for all purposes and on all occasions. If it was a road for particular purposes only, the persons entitled to use it for these purposes might clearly be prevented from using it for any other purposes, as not within the rights granted to, or acquired by them.

"As to the right of footpath, the Lord Ordinary thinks that the sea-shore, being *publici juris*, the respondent was not obliged to assign any particular uses for an access to it. But I conceive that, as different persons might have different uses for an access to the sea-shore, it was necessary for the respondent to state what use *he* proposed to make of such access.

"On the second question, nothing could be more convenient to a party in the situation of the respondent, than to proceed, as he claims a right to do. He says, let me enter into my proof of what the roads are, and when the proof is completed, the Court may declare for what purposes they are to be used.

"But when the right claimed is a servitude by prescription in favour of the lands of Hillside, can proof be allowed as to any right claimed or enjoyed by the proprietors of other lands?

"If it can, only see what inconveniences might result from this, if all the prescriptions were not the same. The prescription of A would not be effectual for B, nor B's for C, and so on. When the respondent, instead of confining himself to the prescriptive right of himself and the proprietors of Hillside, proposes to give proof as to the possession of A, B, and C, of the roads in question, all this may go for nothing: If he should show that A, B, and C, used these roads for *certain* purposes, this would not show that the respondent had a right to use them for any purpose.

"If the respondent's right is founded on prescription, then he must prove his own case. If it were founded in a grant to himself and others, then he might prove the possession of these others, to show that his own right was not lost by non-use, even though he should have used it himself. I have brought these points under your Lordships' consideration at present. On Friday next I shall be ready to state what occurs to me as the fit judgment in this case."

On the 21st June 1813, his Lordship resumed the case.

“ My Lords,

“ In resuming this case, I shall read the summons of declarator to you. (Summons read.) I observe that this action had two objects ; 1. To declare that the proprietors of the barony of Aberdour were free from any servitude to the lands of Hillside of the roads which were claimed ; and, 2. If a servitude was found to exist, to have the extent of it defined.

“ The defence was, that by *prescription* the proprietor of Hillside had a right to the roads in question. This appears to be a sufficient answer to what was asked by the appellant, as to the respondent showing by what title he claimed the road in question.

“ The Lord Ordinary, on the 11th of December 1806, ordained the defender to give in a condescendence of *what* he claimed, and what he offered to prove.

“ A condescendence was accordingly given in. (Here his Lordship read the same.) The appellant insisted in the Court below, as he has done at the bar, that this was not such a condescendence as ought to have been received, as it neither set out the nature nor the purposes of the servitude claimed, and he called for a new condescendence on the following points :— 1. Whether it was claimed by grant or by prescription ? As to this, it appears to me that this was sufficiently set out in the defences. He there claimed a right by prescription, and he must be held to mean such a length of prescription as would confirm such a right. 2. What were the ends and purposes to which the roads were to be applied ? 3. What purposes the respondent and his predecessors have had of the roads in question, without reference to the possession of any other person ? 4. Whether the stepping-stones laid down, or stiles made in the walls through which the roads were claimed, had been made at the requisition of the respondent or his predecessor, or not ?

“ As to this last, I do not think that it is necessary for us to make any alteration in the interlocutors. It would be in the power of the parties, at taking the proof, to put such questions to the witnesses as would bring out with sufficient distinctness the different matters mentioned in this article.

“ As to the second and third articles, the Lord Ordinary has expressed himself thus, in the interlocutor of 13th January 1807 : — ‘ That the defender is no wise called on to assign any particular uses for an access to the sea-shore, which is *juris publici*, and that ‘ the general use of the road in question, by the feuars of Aberdour, ‘ may be very material to ascertain, in leading any proof in support ‘ of the defender’s claim in behalf of Hillside to the same benefit.’ I cannot admit what is here laid down as to the right of access to the sea-shore without some qualification. It is somewhat extraordinary that this doctrine, as to its being unnecessary to assign

1813.

EARL OF
MORTON
v.
STUART.

1813.
 —————
 EARL OF
 MORTON
 v.
 STUART.

any particular uses for an access to the sea-shore, as being *juris publici*, should be stated in an interlocutor which had reference to two roads, one of which was claimed merely as a footpath, the other as a road for horses and carriages. Thus, on the admission of the defender himself, this right of access to the sea shore does not give a road for every purpose.

But it was said, it would appear from the proof what were the uses to which the roads claimed could be applied. It appears to me, however, that, before leading the proof, the pursuer has a right to know what one party has to prove and the other to disprove. Suppose a footpath were claimed for access to the sea-shore for the purposes of bathing, if the Court was of opinion that a servitude for the purposes of bathing could not be maintained, there would be no occasion to go into proof with regard to it.

“As to the other road, it was said that this must be a road for all purposes, because it was a road to a public harbour. This might be true of a highway, open and public for all the king’s subjects; but it is very different here, where the question is, if this road belongs to the proprietor of a certain estate or not?”

“It matters not in this case, what might or what may or may not be competent to the feuars of Aberdour. It is possible that they may have a very limited right in the road in question, such as to bring home articles to their tenements or the like. Any proof as to them is either unnecessary, or it is inadmissible, where the respondent founds his claim on prescription. He must make out his case by proof of the roads having been used, not by these feuars, but by himself and his predecessors, or their tenants.

“In these respects, therefore, I conceive that the judgment must be altered by your Lordships.”

It was therefore ordered and adjudged that the interlocutors of the Lord Ordinary, of 12th and 26th May 1807, and of the Lords of Session, of 10th July 1807, be reversed. And it is further ordered, that the cause be remitted back to the Court of Session, to review the interlocutor of the Lord Ordinary of 13th January 1807; and to ordain the defender to lodge a new condescendence, stating particularly what he claims, and what he offers to prove, and that the Court do then proceed as shall seem just.

For the Appellant, *Sir Samuel Romilly, Tho. W. Baird.*
 For the Respondent, *Wm. Adam. Wm. Erskine.*

<p>THOMAS HALL, Merchant in Berwick-upon-Tweed, and CLAUD RUSSEL, Accountant in Edinburgh, Trustee upon the Sequestrated estate of the said Thomas Hall,</p>	<p>} <i>Appellants;</i></p>	1813.
<p>HERCULES ROSS, Esq. of Rossie,</p>		<hr/> <p>HALL, &c. v. ROSS.</p>
<p><i>Respondent.</i></p>		

House of Lords, 23d June 1813.

LANDLORD AND TENANT—WARRANTY IN LEASE—RETENTION OF RENT—DAMAGES.—In a lease of fishings, the tenant resisted payment of his rent, on the ground of alleged injury done to the fishings by the operations of the landlord in the river, and at the chief fishing station, and damages arising therefrom. Held him not entitled to retain the rent on account of such alleged damages. In the House of Lords, case remitted for reconsideration, with an opinion that damages were due, and that it fell on the Court of Session to ascertain and fix the damages.

A lease was entered into by the appellant of the fishings of Southesk, belonging to the respondent,—the appellant having appeared at a public roup of the same, and offered £600 of yearly rent for a twenty-one years' lease after Candlemas 1801.

This lease described the fishings as “All and whole the salmon fisheries within the water of Montrose River of Southesk, and on the sea coast belonging to the estate of Rossie, together with the salting house at Rossie, *as the said fishings and salting house were lately possessed by John Richardson, Esq.*” And there was absolute warranty of the lease, “*in so far as the different stations have been hitherto fished or occupied.*”

There was no restraint in the lease against the landlord exercising any act of property which he might think proper, and accordingly, soon after the commencement of the lease, he erected a dock for the repairing of ships, upon the island of Rossie, being one of the principal fishing stations.

The appellant alleged that this erection had injured, in a very considerable degree, the yearly value of the fishings, and this was done, although the fishings were expressly let “*as lately possessed by John Richardson, Esq.,*” and although they were warranted to him, “in so far as the different stations have been hitherto fished or occupied at all hands mortal.”

A claim of damages having been preferred for Hall during the first year of the lease, this was referred to arbitration, and, after taking proof, the arbiter found, by his de-

1813. **HALL, &c.**
v.
ROSS. cree arbitral, that the operations connected with these erections had injured the fishings during the previous season, and awarded £133 of damages.
- The injury during the succeeding seasons having been greater, he preferred a further claim, but this was resisted, coupled with a refusal to submit the matter to arbitration; and the respondent having threatened a charge for payment of the rent on the lease, the appellant brought a suspension. This being passed, and the letters expedite, the question came to be discussed before Lord Balmuto, who was pleased to pronounce this interlocutor, ordering the suspender to lodge the bill for the sum of £600, consigned by him in the Montrose Bank, in process, being the year's rent due at Martinmas 1802, in order that the same may be delivered up to the landlord, without prejudice to his claim of damages.
- When the rent fell due at Martinmas 1803, the appellant brought another suspension, which was conjoined with the former process.
- The appellant having been ordered to give in a condescendence of damages incurred to the fishings, this was done, and a proof allowed and taken. In the meantime, a third suspension was brought, as to the year's rent due at Martinmas 1804, which was also conjoined. The Lord Ordinary then, upon advising the state of the whole cause, pronounced this interlocutor: "Having considered the mutual
Nov. 12, 1805. "memorials for the parties in the conjoined suspensions
"offered against payment of the rents of Rossie fishings for
"the years 1802, 1803, and 1804, payable at the term of
"Martinmas each of these years, with the whole former
"proceedings, repels the reasons of suspension, finds the
"letters and charge orderly proceeded, under deduction of
"the sum of £600, consigned by the suspender with the
"branch of the Bank of Scotland at Montrose, as the year's
"rent for 1802, and which was ordered to be paid up to the
"charger, and decerns: Finds the suspender liable in expenses, and ordains an account thereof to be given in,
"and, when lodged, allows the suspender to see and object
"to the same." On representation the Lord Ordinary adhered. On further representation, the Lord Ordinary found that he was entitled to credit for £400 admitted to have
Nov. 28, — been paid, and *quoad ultra* adhered.
- Dec. 20, — May 22, 1807. On reclaiming petition to the Court the Lords adhered.
- Dec. 1, — And, on further petition, they adhered.

This latter judgment having been pronounced by a narrow majority, the present appeal was brought to the House of Lords.

1813.

HALL, &c.,
v.
ROSS.

Pleaded for the Appellant.—The appellant, Mr. Hall, paid a high rent for the above mentioned fishings, and he was therefore entitled to expect he should be allowed to possess them without interruption or molestation from any quarter, and particularly without molestation or interruption occasioned by the respondent, to whom that high rent was to be paid. The contract of lease is a *bona fide* contract, which implies in its very nature that the tenant shall have a free and uninterrupted enjoyment of the subject let to him; and, consequently, if such enjoyment is prevented or interrupted by any operations of his landlord, he has a right to expect compensation for the damage that has ensued. Such claim of damage is founded in the very nature of the contract, without any express obligation undertaken by the landlord to that effect; but, in the present case, there is superadded an explicit obligation by the landlord, whereby he is bound to warrant the fishings in question to the appellant, in so far “as the different stations have been hitherto fished or occupied at all hands mortal.” Warrantice at all hands imports not only that the use and possession of the subject shall be made good to the tenant, undisturbed by any operations of the lessor, but undisturbed by the operations of any person whatever.

The appellant has instructed by the clearest evidence, that his possession was interrupted in a variety of different ways, in consequence of operations carried on even by the respondent himself, or by those acting under authority from him, with a view to his profit and advantage. A dock was erected at one of the most valuable fishing stations let to the appellant, and the fishing there was interrupted and injured by the materials laid down in the bed of the river for constructing the dock; by foul water being poured into the river, which turned away the salmon; and from vessels being allowed to lie in the fishing stations so as to obstruct the fishery in a very great degree. In these various ways the respondent has incurred the warrantice of the lease, and the appellant is entitled to recover from him whatever loss and damage have been sustained from the respondent's breach of contract.

All the pretences set up by the respondent, in the view of

1813.
 HALL, &c.
 v.
 ROSS.

avoiding implement of his obligation of warrandice to the appellant, are frivolous in the extreme. The interruption given to the fishings in the different ways above mentioned, is proved beyond dispute; and where a salmon fishing is interrupted there must unavoidably be damage. It is an absurdity to say, that a tenant suffers no damage although he proves that the fish were scared away, and that he is prevented from carrying on the fishing by obstructions of different kinds.

Pleaded for the Respondent.—The rents of the years in question have been long due to the respondent, in terms of the lease entered into between him and the appellant, Mr. Hall. This just and liquid debt is by no means compensated, nor ought payment of it to be held on account of claims of damages, which even the appellants seem to admit are of a trifling nature, more especially when it is considered that the chief subject of complaint is the erection of the dock on Rossie Island, of which Mr. Hall was perfectly aware before he took the lease of the fishings, and which his agent saw carrying on without making any objection. But, 2. Not only have the appellants completely failed in their endeavours to substantiate their allegations, but it is established by the clearest and most convincing evidence, that no damages whatever have been occasioned to the fishings by any operations which the respondent carried on, or for which he was answerable; and that Mr. Hall was in no degree prevented, during the years of his lease, from enjoying the full benefit of these fishings, in so far as they had been possessed by former tenants.

After hearing counsel,

LORD CHANCELLOR ELDON said,

“ My Lords,

“ This is an appeal against certain interlocutors of the Court of Session. The most material interlocutor of the Lord Ordinary, upon which the others are founded, is that of the 12th Nov. 1805. (Here his Lordship read the same).

“ In this case, a lease was made by the respondent Ross to the appellant Hall of certain fishings. I lay entirely out of view the fact, which has been a good deal founded on, that Ross had, before this time, formed a plan for constructing a dry dock, and that the appellant knew of such his intention. Nothing can be more dangerous than our construing a contract by any thing out of the contract. The parties, in their contract, say nothing as to this dock;

we have nothing to do here with the intentions of the one party, or the knowledge of the other in regard to it. The only question for us to consider is, what Ross meant to give under the lease, and what Hall meant to hold?

"The lease lets to him the following subjects. (Here his Lordship read the description of the fishings in the lease, with the terms of the warranty, absolute and from fact and deed).

"Without any exception to what was said at the bar, as to the warranty that would, by the law of Scotland, have been implied in a lease like this, it appears to me to have been the clear intent of the parties, that this lease should contain two species of warranty, one as to the mode of fishing formerly practised against all the world,—the other, as to any improved modes of fishing from the acts and deeds of the lessor.

"The rent was £600 a-year, being, as was stated, a considerable increase over any former rent; and a great deal of argument was used upon this, that the fishings could not have been damaged by the respondent's operations in the present case, because the appellant's lease was disposed of to an advantage, a grassum of £250 having been obtained for it. But when we are to consider of this judicially, we must lay all this out of the case. Even though the fishings had been subset at £1200 a-year, if the appellant had suffered damage and injury in previous years, this would not have compensated him for such damage and injury.

"But it is true, you must prove such damage and injury. It was said, in the present case, that the evidence did not establish this. I shall show you how it appeared to the Court of Session, and how they dealt with it.

"There appear to have been fourteen of the Judges present at the last decision of this cause, according to the notes of their speeches, with which we have been furnished. Seven of the judges who spoke, were for altering the former judgment. Of course they must have been of opinion that the appellant had sustained damage.

"Lord Balmuto does not admit that he sustained any damage; but considers that there might have been an inconveniency, which the appellant might have obviated by adopting a new mode of fishing. But the landlord had no right to force the tenant to this.

"Lord Armadale, although his judgment was against the appellant, admits that he sustained damage to some amount; but, as he could not state the amount of such damage with precision, he decided against the suspender.

"Lord Craig thinks there might be damage; but that the amount of it was not to be ascertained. The Lord Justice Clerk thinks there might be damage, but that it was vague and uncertain; he mentions that salmon seemed to be capricious and whimsical in their nature and habits, and after giving damages for one year, in the next the fishing might be more productive than ever. But this principle will not

1813.

 HALL, &c.
 v.
 ROSS.

1813. do, the subsequent productiveness is no compensation for damages in former years.

HALL, &c. " Lord Meadowbank alone says that no damage has been proved.
v. Two of the judges, Lords Glenlee and Robertson, state no grounds for
ROSS. their opinion. Thus a great majority of the Court were of opinion that damage had been sustained.

" I have always found cases of salmon fishing of considerable difficulty, from the discussion entered into, as to temper and disposition of the salmon, and as to their smell and taste. On this I find great contrariety of opinion ; so in the present case, I find it matter of dispute, if they are more or less *nice* and *delicate* in their habits, and if a muddy river is disagreeable to them or not. But when two men enter into a contract as to a salmon fishing, I think it is much more important to consider if they observed their contract, or have departed from it, than to enter into the discussions of philosophers on the world of fish.

" It was argued to-day, that even though the appellant had lost one fishing station, yet if he caught as many fish as before, at the remaining stations, then he had sustained no damage. But if he contracted for ten fishing stations, what right would the respondent have to reduce them to nine ?

" In this country, when we get at a case of damage, we never hear of giving judgment against a party who has sustained the damage. We say, that when you arrive at the point of damage, by fixing whether liability attaches in the particular case, you may settle the *amount* to be given in one of two ways ; if you can get persons of skill in such matters to give a distinct opinion thereon, the *amount* may be fixed in that way ; if you cannot obtain this, then nominal damages are given.

" I see the Court below had difficulty as to the *amount* of the damage in this case. From the arguments urged at the bar, I had at first thought that the appellant had made no distinct averment on the subject ; but I see that he lays his damages in his condescendence at £200 a-year. On the other hand, it was said that the decret arbitral might enable me to fix the damages. It cannot do this ; but it is evidence of damages of some amount being due, for the period to which it relates.

" The Lord President says, that there are a great many cases where the Court gives damages, by conjecturing as to their amount ; and there are other judges of same opinion.

" As to the law of the case, one of the judges thought that no damages are due, because navigation is the primary use of all waters. He says, ' it is amusing to hear a complaint that fishers are interrupted ' in their employment by ships.' But when a party binds himself to pay £600 a-year for a salmon fishing, if the proprietor of the fishing thought fit to destroy it, in order to serve any purpose connected with navigation, the tenant might legitimately consider it far from

amusing to be still obliged to pay his rent. Upon the whole, therefore, as I consider that damage has been done to the tenant's fishing in this case, I think this ought to be declared by your Lordships' judgment, and that the cause ought to be remitted back to the Court of Session to review all their interlocutors, and, with this finding, to do as they shall see just, taking care always that the appellant be confined to the premises laid in his condescendence."

LORD REDESDALE said,

" My Lords,

" When one of two contracting parties to a contract alleges that he has received damage in the subject of the contract, it is not enough to say, that its produce on the whole has been as good as it was before. The party must answer for this damage on the contract. If ten fishing stations are contracted for, and one of them is injured, that is damage. Nay, that there was actual damage in this case, seems to be admitted. The chief difficulty is to ascertain the amount of the damage. This is a duty which falls upon the Court. I see they have done it in other cases, and that it was done in the case of *Wight v. Dickson*, decided this morning. On this case, and on *Dow*, vol. i. others of a similar nature, there appears to be reason to lament that the Court of Session has not the same means of coming to a right decision that we possess in this country."

The Lords find, That if the acts of the respondent complained of occasioned any damages to the tenant of the fishings demised, the amount of such damages ought to be paid by the respondent; and further find, that some damages were sustained by the tenant; And it is therefore ordered and adjudged, That the cause be remitted back to the Court of Session in Scotland, with an instruction to the Court to ascertain the amount of the damages, either by allowing the appellants to examine witnesses for the purpose of establishing that amount to or within the extent thereof limited in the condescendence, with liberty also for the respondent to examine witnesses touching the same, if he shall think fit, or to ascertain it in such other manner and proceeding as may be according to the practice of the Court, and thereupon the Court is to proceed as shall be just: And it is further ordered and adjudged, That, with these findings and directions, the Court of Session do review all parts of all the interlocutors complained of in the said appeal, and after such review to do therein what shall appear to the said Court to be just.

For Appellants, *Wm. Adam, Sir Samuel Romilly, Tho. W.*

Baird, W. G. Adam.

For Respondent, *Wm. Murray, James Walker.*

1813.

(Fac. Coll. p. 518.)

HENDERSON,
&c.
v.
ALLAN, &c.

MESSRS. HENDERSON and SELLAR, Merchants } *Appellants* ;
in Liverpool, }
ALEXANDER ALLAN and Others, Under- }
writers on the ship Imperial, on a voyage } *Respondents*.
from Liverpool to Africa and back, and }
Others, Underwriters on the cargo, }

House of Lords, 23d June 1813.

INSURANCE—DEVIATION—CONCEALMENT.—A policy of insurance, of a vessel and cargo to the African coast and back, bore, “ with liberty to exchange goods with other ships, and to sail to, and touch and stay at any port or ports or places whatsoever and wheresoever, without being a deviation.” No mention was made that another vessel was to co-operate as a tender, and the ordinary premium of six per cent. was paid; Held that this co-operation ought to have been disclosed, as it changed the risk from the ordinary one of a single ship, and prolonged materially the length of the voyage.

The appellants were owners of five-sixths of the ship Imperial, of 500 tons, which, in the end of January 1803, set sail from Liverpool for the coast of Africa, and from thence to return direct to Liverpool with a cargo of palm oil, gold dust, ivory, and other produce of the country. The value of the vessel was £10,000, and the cargo upwards of £20,000.

To secure this interest, the appellants effected insurances in different English offices to a considerable amount; and, in prosecution of the same object, in *Scotland*, they addressed the following letter to Messrs. Liddle, insurance brokers, Leith: “ Please effect two thousand pounds, per Jan. 21, 1803. “ the Imperial, Thomas Marshall, at and from Liverpool to “ the coast of Africa, and the African islands, *during her stay* “ *and trade there*, and from thence back to Liverpool, *with* “ *liberty to exchange goods with other ships*, at six pounds per “ cent. The Imperial was lately built at South Shields, “ originally intended for the service of the East India Company, is five hundred and thirty tons register, copper-fastened and copper-sheathed up to the bends, and intended “ to sail in about a week. Upwards of £5000 has been “ done on her on these terms to day here. As your underwriters may not be accustomed to these risks, it may be “ necessary to say, that we purchase no slaves, nor does the

“ ship go to the West Indies: We barter the produce and
“ manufactures of this country for the produce of Africa.” 1813.

In consequence of this letter, a policy to the extent of £2000 was effected on the 21st day of January 1803, “ On
“ the ship Imperial, to and from Liverpool to the coast of
“ Africa, and the African islands, during her stay and trade
“ there, and from thence back to Liverpool, *with liberty to*
“ *exchange goods with other ships: And it shall be lawful*
“ *for the said ship, in her voyage, to proceed and sail to, and*
“ *touch and stay at any port or places whatsoever and*
“ *wheresoever, without being a deviation, without prejudice*
“ *to the insurance. Total £10,000, premium 6 per cent.*”

HENDERSON,
&c.
v.
ALLAN, &c.

Policies were also opened by the appellants on the goods per the said ship, all in the same terms, viz., “ At and from
“ the vessel’s arrival twenty-four hours at her first place of
“ trade on the coast of Africa, *during her stay and trade there,*
“ and from thence back to Liverpool: and the vessel was to
“ have liberty to touch and stay at any port or ports what-
“ soever, as before mentioned.”

The Imperial, with her cargo, was worth £30,409. 4s., and, deducting the share of a Mr. Lightbody (owner to the extent of one-sixth), the appellants’ interest amounted to £25,341. And, on the two interests of ship and cargo, policies were opened in England and in Scotland to the amount of £17,550, leaving uninsured £7791 sterling.

The appellants further explained the following circumstances in regard to this particular trade, and the usage which prevailed in regard to it, which they offered to prove by evidence:—That it was a trade conducted on the principles of barter. The inhabitants neither gave nor got credit, and no bills were granted for balances; but the outward bound cargoes of European vessels were exchanged for the produce of Africa, so that when any surplus of the outward bound cargo remains, it must either be sold to the masters of other European vessels on the coast, or brought home again. In the course of trading too with the natives, in consequence of their selecting some part and leaving another, the cargo usually got unasorted, which made it necessary to make up these deficiencies by exchanges with the masters of European vessels on the coast. Further, it was stated, that when two or more vessels in the same employ meet on the coast, it was customary for masters not only to aid each other by mutual exchanges, but to aid the dispatch of the one most forward, by assisting her with cargo homeward, and relieving her of outward cargo

1813.
 HENDERSON,
 &c.
 v.
 ALLAN, &c.

unexpended, without regard to any proportion between the goods so delivered or received ; and that this mode tended greatly to facilitate the dispatch of both vessels. It was therefore common with traders in the African trade to dispatch two vessels within a short time of each other, giving the control to the most experienced master, and he in the subordinate command is dispatched from place to place as the other sees fit ; and when a cargo has been collected sufficient to dispatch one of the vessels, he having this control fills her with a homeward cargo, and relieves her of her unexpended outward cargo, without regard to any proportion between the goods so delivered or received ; and the vessel so loaded is dispatched homeward. This line of conduct is plainly beneficial to all interested, as it facilitates dispatch.

To obviate as much as possible the fatal consequences of delay in so complicated a trade, and in so barbarous a country, a smaller vessel is usually sent out before the larger one, with a valuable cargo, and orders to contract and pay for a sufficient quantity of wood to load both ships. She thus proceeds first to Gaboon, where the wood is got, contracts and pays for a large quantity of wood, and orders it to be brought down from the country to the coast, (a work of time), informing the traders that another ship is to call for part of it, she takes part herself on deck. Then she goes on to Calabar for her cargo of palm oil, for which she barter her cargo of salt, and also opens a trade for the other ship which is to follow. About the time the small ship is full of cargo the large ship arrives, after calling at Gaboon, and getting there her part of the wood on board, she then joins the small vessel at Calabar, puts her wood on board of her, and dispatches her home, and takes on board whatever part of her outward cargo remained undisposed of ; and she remains to conclude her trade and complete her cargo. It was thus that the appellants did in the present case. They sent out the *George* sometime before the *Imperial* ; and vessels so circumstanced are, in the African trade, said to be tender to the other, and only pay half dues in consequence.

The plan of the voyage, as shown by the instructions given to the captains of the *Imperial* and *George*, was as above detailed ; the *Imperial*, after getting her palm oil on board at Calabar, was to proceed to Cameroon, to finish her trade there, and in purchasing ivory, pepper, and bees' wax, and thence she was to go to Gaboon to fill up the ship with the wood which the *George* had contracted for.

Accordingly the Imperial sailed from Liverpool on Jan. 1803, with her assorted cargo for the voyage insured. She arrived at Gaboon on the 28th March, and took as much wood as she could stow, consistently with her out cargo still on board. A mutiny, and ultimate loss of some of the seamen, took place here, and detained the ship. She afterwards proceeded to Calabar, where she found the George nearly full of oil and barwood; and that ship sailed in a few days for Liverpool, having received on board the thirty tons of barwood which encumbered the deck of the Imperial, and delivered over in return to the latter ship the portion of her outward cargo still undisposed of. The Captain of the George, being an officer of greater experience, took the command of the Imperial, and the Captain of the Imperial went home with the George, after having supplied the Imperial with six of the George's men.

1813.

HENDERSON,
&c.
v.
ALLAN, &c.

The Captain of the Imperial now finished his trade at Calabar. He next sailed for Cameroon, to finish his ivory trade, where he was detained sometime, owing to a quarrel between the natives and the crews of other vessels, which the natives, as usual, resented on all Europeans indiscriminately. Afterwards he proceeded with his trade, and having completed it, proceeded to Gaboon to complete his cargo of wood. Having been informed that a French privateer was expected at Gaboon in a few days, she, in consequence of this information, sailed as speedily as possible for Anabanka, a Portuguese settlement, where she was captured by a French privateer on 14th February 1804.

There being a total loss both of ship and cargo, the appellants made their claim against the underwriters. All of those offices in England, where insurances were effected, settled at once, with one or two exceptions, of persons who have since paid after litigation. The underwriters in Scotland refused, however, to settle the loss; and action was raised by the appellants in the Admiralty Court, where, after much procedure, judgment went in favour of the appellants, which decree was brought under review of the Court of Session by suspension. The defences stated by the respondents, were, 1. That instead of this being a voyage of seven or eight months, it was a voyage of much longer time, and that they had discovered the Imperial did deal in slaves. 2. That instead of "bartering the produce and manufactures of this country for the produce of Africa," she was employed for no shorter a period than *three months* as a floating warehouse, or, in other words, in collecting and tran-

1813. **HENDERSON, &c. v. ALLAN, &c.** sporting goods for behoof of another vessel belonging to the appellants, called the *George*, to procure the dispatch of which with a full cargo was in fact the primary object of her voyage. 3. That insurance to the extent of only £1000, and not £5000, as represented, was effected in Liverpool on the vessel. 4. That instead of the 29th October and 26th November, the time at which she was to leave the coast of Africa, it was known she could not leave until December thereafter. 5. That the crew never consisted of 35 men.

The question was, Whether the words in the policy, “from Liverpool to the coast of Africa, and the African islands, *during her stay there*, and from thence back to Liverpool, *with liberty to exchange goods with other ship or ships*,” and “also to proceed and sail to, and touch and stay at any port or places whatsoever and wheresoever, *without being a deviation*,” were to be construed in an enlarged sense of the privileges conferred, or in a more limited sense; and whether, from the facts proved, as above set forth, the appellants had exceeded the privileges allowed by the policy?

The cause came before Lord Meadowbank as Ordinary, Nov. 14, 1809. and his Lordship pronounced this interlocutor: “Having considered the several memorials of the parties, ordains the cause to be enrolled, and the chargers to state at the calling, whether they are ready to undertake a proof that, according to the understanding of those engaged in the African trade, a liberty to exchange goods with other ships, imports a liberty not only to barter or sell, but to aid another ship in providing her speedily with a homeward bound cargo, without regard to any proportion between the goods so delivered or received.”

Afterwards, on a minute and answers, his Lordship pronounced Dec. 12 1809. this interlocutor:—Before answer, allows the chargers to prove, that according to the understanding of those engaged in the African trade, liberty to exchange goods with other ships, imports a liberty not only to barter and sell, but to aid another ship in providing her speedily with a homeward cargo, without regard to any proportion between the goods so delivered or received; and allows them a proof of all facts and circumstances relative thereto; allows the defenders a conjunct probation.”

The proof having been completed, his Lordship pronounced Jan. 17, 1811. this interlocutor:—“Having resumed consideration of these conjoined processes, and advised the proof, finds that the privilege specified in the different policies of insurance, with liberty to exchange goods with any other ship or

“ ships, or with liberty to exchange goods with every vessel
 “ or vessels, does not, in common language, and without a
 “ peculiar conventional meaning, import a liberty to exchange
 “ goods, without regard to observing any proportion in bulk
 “ or value between the goods so exchanged; and still less
 “ that the exchange may be so conducted by the vessels in-
 “ sured, as that it should retard the completing of her own
 “ cargo, and protract her own stay in the seas where it is
 “ to be completed, and in order to hasten the accomplish-
 “ ment of the voyage of other vessels, or another vessel, and
 “ her or their speedy dispatch with a competent cargo; and
 “ as the risks of sea hazard are increased beyond an arith-
 “ metical proportion by the prolongation of the adventure,
 “ particularly in the business of a coasting voyage to com-
 “ plete a cargo, so enlarged a construction of the privilege is
 “ more difficult to be entertained, where nothing appears in
 “ the rate of insurance stipulated between the parties, in-
 “ dicating that such an eventual augmentation of risk was
 “ in contemplation: Finds it nevertheless proved, that the
 “ enlarged construction of the privilege contended for by
 “ the chargers was adopted by a great number of the dealers
 “ and underwriters in the African trade, but not uniformly
 “ in point of extent of such construction, and not universally
 “ in any extent even at Liverpool; and, amidst this diversity
 “ of sentiments, being on the whole of opinion that, in apply-
 “ ing for insurance at such an out-port as that of Leith, it
 “ was the duty of the assured not to rely on a conventional
 “ meaning so adverse to the natural meaning, and attended
 “ with so much difficulty, while not established with absolute
 “ universality among all versant in the trade, but to disclose
 “ the retardment and increase of risk that might be expected
 “ from the privilege stipulated; Suspends the letters *sim-*
 “ *pliciter*, and decerns; but believing the chargers indivi-
 “ dually may have proceeded *bona fide*, though on somewhat
 “ too great confidence in their own practice, finds no expen-
 “ ses due, and decerns.” On a representation the Lord Or-
 “ dinary adhered, adding the note below as the grounds of his
 decision.* On reclaiming petition to the Court, and answers,

1813.
 HENDERSON,
 &c.
 v.
 ALLAN, &c.

Feb. 13, 1811.
 Feb. 22, 1812.

* Note by the Lord Ordinary.—“ I certainly proceeded, in pro-
 “ nouncing the interlocutor, on the opinion that the long stay of the
 “ Imperial, for so many months on the coast, was not at all accounted
 “ for but from her subserviency to the George; and if the chargers
 “ reclaim, this seems to me essential to be obviated.”

1813.

HENDERSON,
&c.
v.
ALLAN, &c.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The words of the policy are so broad in their natural interpretation that they may include a voyage extending to any given period of time, and to transactions of exchange with other ships to any imaginable extent. They are (1.) “To the coast of Africa, and the African islands, *during their stay and trade there*, and from thence back to Liverpool.” (2.) “With liberty to *exchange goods with other ships* ;” and, (3.) “With license to the said ship, &c. to *proceed, and sail to, and touch and stay at any ports or places whatsoever and wheresoever*, “without being deemed a deviation.”

As there is here an unbounded license in point of time, combined with the fullest power to exchange goods with other ships, so there is no rule of proportion laid down for regulating such exchange. It lies on the underwriter to restrict the sense of these words, either by mercantile usage or legal construction, so as to establish that the circumstances of the voyage in question are not fairly comprehended within their technical meaning. No doubt the underwriters say, that, taking only the small premium of six per cent., they calculated only on a voyage of seven or eight months, whereas the voyage in question was of a most extraordinary duration, even considered as an African voyage. But the answer to all this is, that a mercantile contract of this kind must be interpreted according to the usage that may have arisen, and that existed in regard to such voyage ; and the underwriter must be held to have informed himself, wherever his residence may be, of all the peculiarities attending the contract. The voyage in question did not exceed the usual or necessary duration of a voyage in the wood and ivory trade. This sort of voyage is very seldom concluded within the year, and most commonly the ships remain in the rivers of Africa eighteen or twenty months. So well known in the trade is this long duration of the African wood and ivory voyages, that, in the case of *Freeland v. Glover*, decided 9th June 1806, the Judge said : “That no underwriter is so little conversant with the African trade as not to know that it consists in truck ; and that the ships engaged in it always continue for sometime upon the coast, in some instances, as we learn from cases that have come before the Courts, for above a year.”

7 East's Rep.
p. 402.

2d. Insurance is a contract of speculation ; and the policy in question must be taken and construed, relatively to the

proposed voyage, according to the usual and approved method of conducting such voyage. The dealings had therefore with the George was in accordance with the usage of such voyage. If, therefore, there be nothing inconsistent with the known and approved nature of the contract, in the instructions given for the prosecution of the voyage, it would not avail the respondents though it could be shown that disappointments had arisen in the execution of these orders. Then, on comparing the voyage, as planned in the instructions with the usual course of such a voyage, as proved by those conversant in the trade, they will be found completely to accord, and it will further be found, that this plan of voyage is more favourable to expedition than that of a single ship unaided by another. Expedition is the necessary result of such an arrangement: namely, That the two ships co-operated with each other; and that, by such co-operation, the voyage of each was more accelerated than if she had been left unassisted in her traffic; and that this was the most approved method of carrying on the trade. Such was the bearing of the evidence, and, though some discrepancies appeared in the testimony of some witnesses, yet, as a whole, the custom founded on was established; and the fact, that fourteen different offices in England settled with the appellants their insurances on the ship and cargo, to the extent of £10,000, only gives additional weight to this part of the case.

1818.

HENDERSON,
&c.
v.
ALLAN, &c.

Pleaded for the Respondents.—1st. For all the reasons stated in a case upon the table of the House, for William Tennant, Richard Bannatyne, and others, also underwriters on the said ship and cargo, in an appeal wherein they are appellants, and the present appellants are respondents, and to which case the respondents humbly beg leave to refer, they hope that the interlocutors will be affirmed. 2d. In addition to the reasons which have been there urged, there has been a proof led in this case before the Lords of Session, by which it has been established, in point of fact, that by the usage of the African trade, “a liberty to exchange goods,” which are the words employed in this policy, does not imply a traffic of that description in which the Imperial was actually engaged. The general principle of law which is to regulate the examination of the evidence upon this point, is stated justly and clearly in the interlocutor of the Lord Ordinary appealed from, and indeed there can be no doubt of its justice. To attach to a written contract a meaning different from what its terms plainly import, it is necessary that the usage upon which this plea rests, and by

Vide Dow's
Reports, vol.
i. p. 324.

1813. which the interpretation is to be much affected, must be
 ————— *clear, universal*, and unequivocal, admitting of no doubt or
 HENDERSON, difference of opinion among those whose business it is to be
 &c. acquainted with the nature of the trade in which the usage
 v. is alleged to exist. The evidence founded on by the appel-
 ALLAN, &c. lants is of a description entirely different.

In the first place, there were in the Court below no fewer than sixteen witnesses examined as to the general practice being such as took place here; but, excepting four of these witnesses, their depositions do not go nearly to the extent necessary to make out the general custom pleaded by the appellants. In the second place, it will be observed, that wherever a question is applicable to the precise facts attending this case, *all* the witnesses gave testimony in favour of the respondents. Thus Hamlet Mullion depones, "That, as an underwriter, he would certainly expect a higher premium for insuring a vessel that must, from the nature of her voyage, remain twelve months on the coast, than he would on insuring the same vessel to the same part of Africa, that must not, from the nature of the voyage, be detained longer than six months." So other two of the appellants' witnesses depone in like manner. Besides, the respondents' witnesses confirm this fact, and establish, besides, other material facts. Thomas Bushel depones, "That if a vessel was sent out to Africa, for the purpose of running down the coast, and collecting cargo for another ship then on the coast, and despatching her speedily to a market, and taking on board the unexpended part of the outward-bound cargo of the vessel so despatched, and afterwards remaining on the coast prosecuting her own voyage, he should then consider such ship so remaining on the coast a factory ship, and that she ought to be insured accordingly at a much higher rate of premium." The respondents maintained, therefore, that this was not a plan of mere co-operation and assistance, but acting as a floating warehouse for the exclusive benefit of the other vessel. The case, *Hartly v. Buggin* must be taken as having decided the law in such cases, where Lord Mansfield laid down the doctrine in these words: "The single point here is, Whether there has not been what is equivalent to a deviation? Whether the risk has not been varied, no matter whether the risk has or has not been thereby increased? If a ship, insured for a trading voyage, be turned into a floating warehouse, or a factory ship, the risk is different. It varies the stay;

Hartly v. Buggin.
 2 Park Ins. p. 468; Marsh. Ins. i. p. 194;
 3. Doug. 39.
 Lord Mansfield's Opinion.

“ for while she is used as a warehouse no cargo can be
 “ bought for her. This is the law. The fact is, that though
 “ this was not a regular *thatched* factory ship, yet she was
 “ used as a thatched factory ship is used. This being clear,
 “ it follows that the risk is different in point of length from
 “ that which is generally understood in the trade, and, con-
 “ sequently, from that which was insured.”

1813.

DUKE OF
 HAMILTON, &c.
 v.
 SCOTT.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained
 of be, and the same are hereby affirmed.

For the Appellants, *J. A. Park, David Douglas, Geo.
 Jos. Bell.*

For the Respondents, *M. Nolan, Alex. Maconochie.*

HIS GRACE THE DUKE OF HAMILTON AND }
 BRANDON, and other Heritors of Avon- } *Appellants;*
 dale, }
 REV. JOHN SCOTT, Minister of the said }
 Parish of Avondale, } *Respondent.*

House of Lords, 14th July 1813.

FREE MANSE—REPAIRS.—A manse had got into disrepair, and certain
 proceedings had been instituted before the presbytery with the view
 of having it repaired, which was ordered and done accordingly.
 Thereafter the heritors applied to have the manse declared a free
 manse. The presbytery declared the “ manse and its offices are
 sufficient” as to the repair *then* ordered. The question was, Whe-
 ther the manse, under this finding, was declared a free manse, so
 as to throw the burden of subsequent repairs on the minister during
 his incumbency? Held that the manse had not been declared a
 free manse, and that the heritors were liable in further repairs.
 Opinion given, that even supposing the manse had been declared free,
 that this would not bar repairs arising from the waste of time.

The respondent’s manse having been found in such disre-
 pair as to compel him to leave it, he applied to the presby-
 tery to order, in due form, his manse to be repaired, who Feb. 1787.
 appointed persons to inspect it, and report on its condition,

1813. and to give in to the presbytery "their written and subscribed
 " report, containing a plan and estimate of sufficient repairs."
 ——— DUKE OF In terms of this remit, the manse was surveyed, and a report
 HAMILTON, & C. given in, stating that the necessary repairs might be com-
 r. pleted for £69. 8s. 4d. and the presbytery accordingly pro-
 SCOTT. nounced decree for the sum of £75. 14s. 4d., and ordered the
 repairs to be executed to that amount, and these repairs were
 executed accordingly.

1790. In June 1790 thereafter, application was made by the
 heritors to have the manse declared a free manse. The
 presbytery appointed persons to inspect the manse and
 offices, and report. This report bore, that the respondent
 had not followed the scheme of repairs that was laid down,
 and had finished them in a more elegant and better manner,
 and that some repair still remained to be done; and the pres-
 bytery "find that the manse of this parish, and its offices,
 " are sufficient, when the deficiencies specified in the report
 " are executed; and the presbytery appoint Mr. Scott to have
 " said deficiencies executed against Whitsunday next, and
 " that the expense of the same shall be on Mr. Scott."

In 1796 the minister applied to the presbytery for a visita-
 tion of the church and manse. An estimate was given in by
 persons appointed by the presbytery, and £200 was awarded,
 £34. 12s. 2d. of this sum being for the repair of the manse.

And the present question here is, Whether the heritors are
 bound to be at the expense of this additional repair, after
 the findings of the presbytery in 1790?

The minister stated, that the repair in 1790 was a mere
 patch up, and temporary in its nature; and it was not of that
 thorough and permanent nature to warrant the presbytery
 to declare it a free manse. The manse and offices were old
 and ruinous, and it was unreasonable to suppose that £69
 could be an adequate sum for a sufficient repair; and it was
 in this sense, namely, that the former repairs were temporary,
 that the presbytery ordered six years thereafter the addition-
 al repair to the extent of £34. 12s. 2d.

The heritors having brought the decree of the presbytery,
 as to these additional repairs, under the review of the Court
 by suspension, and the cause having come before Lord Glen-
 lee, his Lordship reported the case to the Court. The Court
 were of opinion that the previous repairs did not preclude
 the respondent from claiming additional repairs, in so far as
 they were necessary and just; and they remitted to the
 Lord Ordinary to hear parties further upon the amount of the

repairs required. These proceedings ended in a judgment, with which the heritors acquiesced; and the presbytery then proceeded of new to order tradesmen to report, who reported that £44. 11s. 2d. would be necessary to cover the necessary repair. The heritors opposed this judgment, and threatened that, if the decree were carried out, they would take it to the Court of Session. The matter was allowed to drop for five years, and again revived in 1809, when, on a new application, the presbytery, after a report by persons of skill, gave decree for £95. 14s. 1d. On a suspension being brought, the Lord Ordinary pronounced this interlocutor:—"Finds, in the circumstances of this case, Dec. 8, 1809. "that the manse in question is not a free manse, in terms of "law; and therefore repels the reasons of suspension "founded on that allegation; but, before farther answer, "allows the suspenders to give in special objections to the "presbytery's decree, charged against next calling." On reclaiming petition the Court adhered; and another reclaim- Dec. 6, 1810. ing petition was refused. Jan. 17, 1811.

1813.
DUKE OF
HAMILTON, &c.
v.
SCOTT.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The act 1663 declares that, after a sufficient repair of the manse is given to the incumbent, "the manse shall thereafter be upholden by the "incumbent ministers during their possession." The presbytery are appointed by the act to judge in this matter. They did so accordingly, in this case, on the application of the respondent, and, by their decree in 1790, declared, when the deficiencies then ordered were executed, the "manse and its "offices are sufficient." The respondent maintains, that because the word "free" is not here used, that therefore the manse has not been declared a free manse, but Mr. Erskine, in his Institutes, uses the words "sufficient or free," in treating of this subject, and all the other authorities use the terms "*free manse, legal manse, and sufficient manse,*" as synonymous; and there is not one word in the statute which can lead to the inference that the presbytery must use any particular word, such as the word "free," in declaring the manse to have undergone a thorough repair; far less does the statute countenance the proposition that a manse is to be three or four times, perhaps twenty times, repaired during one incumbency.

Pleaded for the Respondent.—The proceedings of the presbytery, after it received the trifling repair alleged, do not

1813. import that the manse was declared a "free manse." These words, in the law of Scotland, have a fixed and definite meaning, and must be introduced in their decree before the heritors are free from further repair. That this was the sense of the presbytery by their decree in 1790, is evidenced by the subsequent proceedings in 1796, when the presbytery ordered additional repairs to be made. 2. But even supposing the manse had been declared a free manse, this would not have barred the presbytery from ordering further repair, if they saw that repair was rendered necessary by waste of time. Such was actually the nature of the repairs here ordered by the presbytery, as may be seen by reference to the tradesmen's report, and, accordingly, the decree now brought under review was a decree for repairs rendered necessary by the decay of the building, arising from the waste of time. In the case of Botriphnie the minister, when inducted, received a manse entirely new. Afterwards proceedings took place before the presbytery, which were held to import that the manse was declared free. But, at the distance of thirty years, the manse became uninhabitable, and the minister applied to the presbytery to have it rebuilt or repaired. The presbytery issued their decree for £120 of necessary repairs. The heritors brought the case to the Court of Session, and pleaded, that the manse having been declared free in the minister's time, he was bound to uphold it during his incumbency. The Lord Ordinary found, "that although the manse had been declared free, *debita opera*, the present condition of the manse and offices, as ascertained by the presbytery, is such as ought, especially after the lapse of so many years, to subject the heritors in "reasonable repairs." On reclaiming petition, the Court adhered, and, on appeal to the House of Lords, the heritors, when the cause was about to be heard, withdrew their appeal.

After hearing counsel,

LORD CHANCELLOR (ELDON) said,

"My Lords,

"This cause has kept its place in the roll for five or six years, and has been represented as being of considerable importance, in its general consequences, to all the heritors of Scotland. In my opinion this is a misconception. I think this case must be decided on its own merits, without affecting any general question.

"With the allegations of litigiousness which have been made your Lordships have nothing to do; and, when parties choose to

bring legal questions regularly before us, we are bound to deal with and to decide upon these alone.

"This is a case, in which all further litigation might be prevented if the parties themselves felt so inclined. If Dr. Scott has got a *Free Manse*, then the heritors are relieved of the expense of all repairs during his incumbency, except those which may become necessary from total decay, arising from the lapse of time. If Dr. Scott has not got a *Free Manse*, the heritors know that there is a mode of proceeding by which they can get it declared free.

"But here the question is, Whether the heritors are liable for all or any of the repairs claimed? We have two judgments of the Lord Ordinary, and two unanimous judgments of the Court of Session, in favour of the respondent. The proceeding in 1796 also has about it a judicial character which is much in favour of Dr. Scott.

"The act 1663, c. 21, declares—(Here his Lordship read that part of the act which relates to manses.)—In this act, the term '*competent manse*,' certainly refers to the size and accommodation of the manse—a manse, according to the term used, '*where competent manses are already built*,' might be *competent*, but not be in repair. The term *upholding*, in this act, will well bear the sense put upon it in the case of Botriphnie, when we consider what is incumbent in the way of repair upon a liferenter as contradistinguished from what in some cases he is liable to.

"I have been looking into the act of Queen Mary 1563, c. 72, and those of King James the Sixth, 1572, c. 48, and 1592, c. 118, and I do not find in them any thing relative to repairs. They only relate to the size and quantity of house and land.

"Mr. Brougham says very truly, that in these acts the term *competent* must relate to size; but he says also, that it is not so in the act of 1663.

"I incline strongly to the obvious construction of the act 1663, viz. that after a *competent manse* has been once built and repaired, it was never intended that any expense should afterwards fall on the heritors but in time of vacancy. Yet, by the construction put upon this act, I hold the law of Scotland to be, that if the heritors of a parish wish to free themselves from all future *ordinary repairs*, they must cause the manse either to be built or repaired, so as to warrant a declaration that the manse is free, and that when they have so done, and have got a declaration of the presbytery that the manse is sufficient and free, they will be exempt from all future repairs, except in the special cases of total decay arising from the lapse of time.

"In this case, it is said that, in 1790, there was a legal declaration that the manse was a *free manse*:—it was declared by the presbytery that '*the manse and offices of this parish are sufficient*.' I do not think this a sufficient declaration that the manse is *free*; but, farther, I think it is impossible to look at the proceedings in 1796, and say that the parties could have thought that the declaration 1790 was a final bar to a claim for repair in future. The Court

1813.

DUKE OF
HAMILTON, &c.
v.
SCOTT.

1813.
 SCOTT, &c.
 v.
 GILLIES, &c.

did not consider it so, unless you could say that the Court only ordered those repairs arising from total decay by lapse of time. You cannot consider the proceedings of 1790 to have been conclusive, for, looking at the items of the repair ordered, it is clear that some of them are those which a minister in a free manse would have been bound to execute himself.

"The proceeding in 1798 is an additional judgment in favour of Dr. Scott to the previous interlocutor.

"I do not rely on the case of Botriphnie, but it goes to say, that in this case the manse has not been declared free; and also to say, that after the lapse of many years, heritors may again become liable to some repairs, even though the manse should have been declared free. But I rely on the words of the act, and on the proceedings in 1796, as explaining the understanding of parties in 1790.

"As to the matter of costs—here there is no general doctrine in question. If the case had involved the interest of all the heritors in Scotland we should have had to lament that all the heritors were on one side, and all the clergy on the other, but with different means of supporting the expense of the suit. But if your Lordships think as I do, that the proceeding in 1796 is an additional judicial proceeding in favour of the respondent, and consider that the judgment of the Court of Session, in this case, is unanimous, though you may not blame the heritors, you will not think it unreasonable that they should pay for their experiment. I therefore move that the judgment of the Court of Session be affirmed, with £150 costs."

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed, with £150 to the respondent for his costs.

For the Appellants.—*Henry Brougham, J. H. Mackenzie, John Jardine.*

For the Respondent.—*Sir Samuel Romilly, John Connell.*

LIEUTENANT-COLONEL HERCULES SCOTT of Brotherton, and JAMES SCOTT, Writer to the Signet, Proprietor of the Mills of Morphy, situated on the river Northesk, } *Appellants;*

THOMAS GILLIES of Balmakenan, DAVID LYAL of Galry, DAVID CARNEGIE of Craigo, JOHN TAYLOR of Kirkton Hill, and the Representatives of Patrick Cruikshank of Stracathro, . . . } *Respondents.*

House of Lords, 20th July 1813.

DAM DYKE—INJURY TO FISHINGS.—The proprietors of certain mills had, in process of time, altered their check dyke so as to prove

injurious to the salmon fishing of the superior heritors : Circumstances in which it was held, that this dyke must be rebuilt and restored to its original state, at the expense of the proprietors of these mills. Affirmed in the House of Lords.

1813.

SCOTT, &c.
v.
GILLIES, &c.

This is the sequel of the appeal reported at p. 337, vol. iv., in which the House of Lords pronounced a judgment, containing special findings in regard to the dam dyke complained of, as injurious to the respondents' fishings, and remitted back the cause to the Court of Session.

The respondents having presented a petition to the Court to apply the judgment of the House of Lords, this petition was remitted to the Lord Ordinary (Lord Woodhouselee). The Lord Ordinary pronounced an interlocutor, applying the judgment of the House of Lords. It also found, " And before answer, ordains the pursuers (respondents) to give in a condescendence of what they require the defenders (appellants) to do, in compliance with the above judgments, and of the grounds on which they insist for the defenders so doing the same, and that against next calling."

A condescendence having been given in, the Lord Ordinary pronounced the following interlocutor :—" Having considered the condescendence and answers, and resumed consideration of the whole process, finds that the judgment of the House of Lords establishes three different propositions, 1st. That the pursuers are entitled to have as free access of salmon to their fisheries as can be had, consistently with the necessary supply of water from the river to the mills belonging to the defenders. 2d. That the present structure of the check dyke built by the defenders is such, that while there is no cruive dyke below it, as formerly, which created a restagnation, the salmon cannot easily pass beyond the said check dyke ; and thus the pursuers have not as free access of salmon to their fisheries as they had formerly, while, at the same time, the mills belonging to the defenders had a sufficient supply of water. 3d. That unless the cruive dyke is replaced in its ancient form, and the former mode of fishing under the statutory regulations therewith restored, the structure of the check dyke must be so altered, and other operations so made, as that both the above objects, viz. the free access of salmon to the superior fishings, and the sufficient supply of water to the defenders' mills, may be obtained. The Lord Ordinary, in conformity with the import and meaning of the above judgment, finds, that unless the defenders shall re-

VOL. V. 3 c

1813. " build the cruive dyke in the same situation as formerly,
 SCOTT, & CO. " and according to its ancient construction, and exercise the
 v. " cruive fishing under all legal limitations, it is incumbent on
 GILLIES, & CO. " them to rebuild the check dyke, making its construction so
 " close as to prevent percolation, and likewise to leave an open-
 " ing in terms of and under the qualifications contained in the
 " act 1696, of its allowing sufficient water to the defenders'
 " mills; and having considered the plans and report of the sur-
 " veyors in process, and particularly the plan exhibited by Cap-
 " tain George Taylor, and delineated on the engraved survey in
 " process, signed by Colin Innes, before answer remits to
 " to examine the present state of the check
 " dyke and mill leads of Morphie and Kinnaber, and to re-
 " port his opinion, whether the plan proposed by the said
 " George Taylor is fitted to fulfil the purposes which he
 " has stated in the conclusion of his signed additional report,
 " and which appears to answer the ends pointed out in the
 " judgment of the House of Lords, which the said Mr.
 " is hereby directed to have under his view ; or if Mr.
 " shall be of opinion that the said plan proposed
 " by Captain Taylor is not sufficient to answer the requisite
 " ends, he is hereby authorized and required to make out a
 " plan and report relative hereto, which shall, to the best of
 " his judgment, fulfil the foressaid purposes, at the least pos-
 " sible expense, and this *quam primum*."

The respondents represented against this interlocutor, praying for an alteration or explanation in so far as regards the rebuilding of the check dyke, in the event of the cruive dyke being replaced. The Lord Ordinary pronounced this
 Dec. 6, 1803. interlocutor :—" Being satisfied that the alteration suggest-
 " ed by the respondents is necessary towards the more ef-
 " fectual carrying into execution the object of the interlocutor
 " of the 12th November 1803 ; and to the complete fulfilment
 " of the judgment of the House of Lords, which it was the pur-
 " pose of the Lord Ordinary by that interlocutor to give effect
 " to, in such a manner as to bar evasion or frustration of the
 " ends thereby meant to be accomplished, therefore, alters
 " the said interlocutor, in the first part of the said decerni-
 " ture, in the following manner, viz. " Finds that, unless the
 " defenders shall rebuild the cruive dyke and check dyke
 " in the same situation as formerly, according to their an-
 " cient construction and dimensions, in such a manner as to
 " occasion the same restagnation as formerly, and exercise
 " the cruive fishings under all the legal limitations, it is in-

"cumbent, &c., and adheres to the said interlocutor *quoad* 1813.
" *ultra*."

At this stage Mr. Scott of Brotherton died, and the action SCOTT, &c.
was transferred against his heir, Lieut.-Col. Scott, who pe- v.
titioned against the above interlocutor, but the Lord Ordinary GILLIES, &c.
adhered. On reclaiming petition to the Court, the Court pro-
nounced this interlocutor:—"The Lords appoint the petition- Dec. 14, 1804.
"er within ten days to state in a minute, whether or not he
"intends to restore the cruive dyke below the check dam, as
"it stood before the year 1772; appoint this petition to be
"answered, the answers to be in the boxes before the 20th
"current."

The minute ordered by the above interlocutor was given
in and answered; whereupon the Court pronounced an inter-
locutor, which led to further discussion, and after other inter-
locutors the Court pronounced this interlocutor:—"The Lords Mar. 5, 1807.
"having resumed consideration of this cause, and advised
"the same, with the mutual memorials for the parties, and
"whole proceedings and productions, approve of the report
"made up and given in by Thomas Telford, engineer, of
"date 15th October 1805, and find that the dam dyke in
"question must be of new constructed, in conformity there-
"to, by and at the expense of the defender Lieutenant
"Colonel Hercules Scott, and be thereafter maintained and
"supported by him, and decern, reserving to him any claim
"competent against the other mill owners, but supersede ex-
"tract till the second box day; and, with regard to the claim
"of damages at the pursuers' instance, remit the same to the
"Lord Ordinary to hear parties procurators thereon, and
"to proceed and determine therein as he shall see cause:
"Find that the memorial for the pursuers contains expres-
"sions highly injurious, derogatory to the established cha-
"racter of Mr. Charles Abercromby, engineer, respecting the
"report made and deposition emitted by him; and remit to
"the Lord Ordinary to cause the said injurious expressions
"to be expunged from the record."

Another reclaiming petition was given in, and the Court
further pronounced this interlocutor:—"The Lords having Jan. 26, 1808.
"resumed consideration of this petition, with the answers,
"they refuse the prayer thereof, and adhere to the inter-
"locutor reclaimed against, with this explanation, that the
"dam dyke recommended by the report of Mr. Telford
"must be constructed and maintained by Colonel Hercules
"Scott, so long as he does not reconstruct and maintain the
"former cruive dam, in such manner as to prevent percola-

1813. "tion through the dam dyke, and, without prejudice to in-
 ———— "sist and determine in the other points of the cause, allow
 SCOTT, &c. "this decret of declarator to go out, and be extracted by
 GILLIES, &c. "the pursuers in the meantime, and that at the expense of
 "the defender, and decern."

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—1. The change of circumstances which has laid the foundation of the present action, at the instance of the respondents, was not brought about by any act, deed, or accidental event, for the consequences of which the appellants, or their predecessors, were responsible to the respondents. It is indisputable, in point of fact, that the appellant, Mr. Scott, is the proprietor of ancient and valuable mills, which are supplied with water from the river Northesk; and that, for the purpose of securing this supply, a dyke or weir was erected by his predecessors, to which, by original grants, as well as by prescription, *longissimi temporis*, he has acquired an unchallenged right. Within the memory of man, this dyke has undergone no species of alteration; certainly no alteration which any person could have challenged as an innovation on the state of the servitude; and, in the former state of the river, from the earliest tradition down to the year 1773, this dyke was not obnoxious to legal challenge of any sort. At that period, an accidental change took place in the state of the river, in consequence of the cruive dyke being swept away by the floods. It is certain that there was then no addition made to the height, or change on the structure of the check-dyke, as it had been for ages before; but there was a change produced on the level of the river, and in its consequent relation to the height of the dyke. For this alteration, can it be alleged that the appellants were in any way responsible? It was, in effect, brought about *vi majori*, by a power beyond human control. Tracing the matter back to its remoter causes, it may be said to have been occasioned by the superior heritors themselves, who insisted that certain alterations should be made upon the construction of a cruive dyke situated below, which were completely incompatible with its stability. That the appellant's predecessors happened to be the proprietors of this cruive dyke, as well as of the check dyke, situated above, is a circumstance from which no legal inference of obligation or liability can be deduced. The cruive-dyke might have been the separate property of another individual; and it would be a palpable fallacy to

suffer the accidental union of two such properties to enter into the consideration of the case. In the original cause of the evil complained of, there is, therefore, no circumstance or quality out of which can be drawn any plea of responsibility against the appellants. The attempts which the respondents have made to trace the evils of which they now complain, to recent alterations in the dam or check dyke, are totally unfounded and unsupported by proof. It is the height of the dyke of which the respondents complain; and there is no evidence to show that its height is now greater than it has been for time out of mind. On the contrary, if any difference in that respect can be remarked in its present state, it is now rather lower than it formerly was. 2. The alterations on the present state of the appellants' property, alleged to be necessary for the accommodation of the respondents, as proprietors of the superior fishings, although they might be such as the appellants were bound to submit to, are not such as they are bound to execute at their own expense, and to maintain at their own risk. By the judgment of the House of Lords, in the former appeal, it was declared, "That so long as the defenders think fit to maintain the said check-dam, without a cruiue-dam below, so constructed as to prevent such percolation, the check-dam ought, as far as circumstances will admit, to be so constructed that the water must flow over, instead of percolating the same, and they must leave a slap in the said dam in terms of the act 1696, if the same can be done without prejudice to the said mills." This declaratory finding in law, that it is a quality inherent in such easement, that it must be enjoyed and exercised so as not to prejudice other rights on the same river, emulously, negligently, or otherwise, more than is necessary to the fair enjoyment of such easement. By this judgment, therefore, it was hypothetically determined, that, for the accommodation of the superior heritors, the appellants must submit to certain alterations in the present state of their property, provided the circumstances of that property would admit of such alteration, and that the same could be done without prejudice to the appellants. These two hypotheses the Court of Session have been since employed in investigating; and by their interlocutors they have determined, in the *first* place, that the physical circumstances of the property admit of the construction of a dam, which, by preventing percolation, shall force the water to flow over it; and, 2ndly, that, in a dam so constructed, a slap may be made sufficient

1813.
SCOTT, &c.
v.
GILLIES, &c.

1818.
 SCOTT, & CO.
 v.
 GILLIES, & CO.

for the access of salmon, which shall be without prejudice to the said mills. According to the reports of the engineers, these objects can only be attained by constructing a dyke according to Mr. Abercrombie's plan, which would cost £5000 or £2000; or, according to the reports of Messrs. Telford and Jessop, £700. According to either plan, the alteration is undoubtedly practicable. But the questions remain, at whose expense are these innovations on the present state of the property to be accomplished? And if the respondents themselves be not preferably liable to the expense and hazard of such operations, are they not of a kind and magnitude which render them legally impracticable, and to which, therefore, the appellants are not bound to submit? These are questions which were not determined by the judgment in the former appeal; and the appellants submit that they are questions which must be determined in their favour. They are not liable in the expense of the proposed alterations, either on the ground that the check dyke has been rendered more prejudicial by any recent operations of theirs upon it, or that the present defect of that dyke was the result of their previous operations upon the cruive dyke.

Pleaded for the Respondents.—It is proved by the reports of the engineers, and the evidence adduced in the Court below, that a check dyke may be so constructed that the water may flow over, instead of percolating the same; that it may be constructed at a moderate expense, and that it will be more permanent and equally serviceable with the present check dyke. 2d. It is proved by the same evidence, that a slap may be left in the dyke to be so constructed, in terms of the act 1696, which will give the salmon free access up the river without prejudice to the mills of Kinnaber or Morpie. 3d. The expense of erecting, and risk of maintaining this dyke, must be upon the appellants, because it is a quality inherent in their right, that it must be exercised so as not to prejudice the rights of the respondents more than is necessary to its fair enjoyment, as appears from the statute 1696, cap. 33, and the judgment of the House of Lords, already pronounced in this cause. By that same judgment it was established that the present dyke has, since the year 1772, been altered greatly to the prejudice of the fishings of the respondents; and also by the terms of the judgment, it is optional to the appellants either to reconstruct the cruive dyke, or to alter the form and structure of the present check dyke, so as not to injure the rights of the respondents.

After hearing counsel,

LORD CHANCELLOR ELDON said,

" My Lords,

1813.

SCOTT, &c.

" This appeal arises out of a former judgment of your Lordships, pronounced in 1802.

" The appellant, Colonel Scott, is the proprietor of certain salmon fishings in the river North Esk. He is also the proprietor of a mill situated on one side of this river; on the other side of the river is a mill belonging to a family of the name of Fullerton of Kianaber; and to these mills there is a mutual dam dyke.

" The appellant's family appear to have had various disputes with the superior heritors, on the subject of their respective rights of salmon fishing. In 1773, in consequence, as is stated, of openings made in the cruiue dyke belonging to the appellant's family, in terms of a former judgment of your Lordships, *that* cruiue dyke was destroyed. The consequence of this was, that the mill dam, by the water not being pent back as before, stood so high out of the water that the salmon could not pass up the river.

" The upper heritors complained of this, but the Court of Session having decided against them, the matter was brought here by appeal. On the 23d of May 1802, your Lordships pronounced this judgment (Here his Lordship read the same at large). The matter having returned to the Court of Session, there has been a good deal of litigation in that Court; and at length the Lord Ordinary pronounced the first interlocutor appealed from, on 12th Nov. 1803. (Here his Lordship read the same.)

" This interlocutor, as well as the judgment of the House of Lords, applied both to the Scotts and Fullertons as defenders. They were mutual proprietors of the check dyke; and Mr. Scott was the sole proprietor of the cruiue dyke. Then another interlocutor of the 6th of December 1803, was pronounced, which also had respect to both.

" On these, various other interlocutors were founded; and the great question between the parties at last came to be, Whether the things to be done would destroy the mill dam or not?

" Mr. Fullerton, the original party, having died, his daughter, Mrs. Fullerton Carnegie, was made a party; but she also died before the action was ended, and it was not revived against her representatives.

" It appeared that the defender, Mr. Scott, had originally undertaken to free Mr. Fullerton from all the costs of the cause, but he had not gone further. It was stated, as matter of objection to the proceedings in the Court below, that Mrs. Fullerton Carnegie's representatives ought to have been made parties, but the Court thought otherwise.

" In a case of this kind, it does not appear that more could be done by the Court than was done in this case. They referred the matter to the consideration of persons of skill, and though there was a difference of opinion among the surveyors, they considered that the greatest weight was due to the opinion of Mr. Telford. In my own view

1813.

DUKE OF
QUEENSBERRY'S
TRUSTEES
v.
EARL OF
WEMYSS.

the Court did right as to this, and their judgment is correct accordingly.

"I should therefore move an affirmance of the interlocutors, but for this one difficulty, that, when the ultimate judgment was pronounced, Mrs. Carnegie's heirs were not before the Court.

"Mr. Scott is not only subjected by the judgment to all the expenses to be incurred, but he is directed to do certain acts upon the mill dam, which he could not be justified in doing, unless the Kin-naber family had been parties to the judgment. If, by these operations, the mills should be stopped, I conceive that, as matters stand, Mr. Scott might be liable in damages.

"There is, I think, no other objection to the judgment but this. The Court has imposed upon Scott the burden of the expense of making the necessary alterations on the dam-dyke, reserving to him any claim competent against the other mill owners. I think the Court acted properly as to this, because the injury to be redressed arose from his not maintaining his cruive dyke. I therefore move judgment as below."

(The judgment, after remitting to consider whether Mrs.

Carnegie Fullerton's representatives ought to be made parties to the cause, proceeded thus): "And, subject to such directions, it is ordered and adjudged that the interlocutors be, and the same are hereby affirmed. And it is further ordered that the cause be generally remitted back to the said Court of Session, to proceed accordingly."

For the Appellants.—*Wm. Adam, Tho. Thomson.*

For the Respondents.—*Sir Samuel Romilly, John Clerk.*

(Mor. App. Tailzie, No. 15; Dow, Vol. ii.)

WILLIAM DUKE OF QUEENSBERRY'S TRUSTEES	}	<i>Appellants;</i>
and Executors,		
THE RIGHT HON. FRANCIS CHARTERIS, EARL	}	<i>Respondent.</i>
OF WEMYSS AND MARCH,		

House of Lords, 10th and 17th Dec. 1813.

TAILZIE—LONG LEASE—ALIENATION.—In the Neidpath entail, there were clauses prohibiting the heirs of entail to "sell, alienate, wad-set, and dispone any of the said lands,"—but allowing tacks to be made of the lands during the lifetime of the heir, "the same always being set without evident diminution of the rental." The late Duke of Queensberry granted a lease of Wakefield for ninety-seven years, at a rent of £86. 15s. 2d., receiving at same time from the tenant a grassum of £318. The question was,

Whether this long lease was not an alienation of the lands? Held that it was an alienation. Affirmed in the House of Lords.

1813.

DUKE OF
QUEENS-
BERRY'S
TRUSTEES
v.
EARL OF
WEMYSS.

The Duke of Queensberry, in 1693, executed an entail with this provision :—" That it shall noways be leisome and " lawful to Lord William Douglas, and the heirs male of " his body, nor to the other heirs of tailzie above mentioned, " nor any of them, to sell, alienate, wadset, or dispone, any " of the said lands, lordships, baronies, offices, patronages, " and others above rehearsed, as well those to be resigned " in favour of the said Lord William in fee, as those reserv- " ed to be disposed of by the said Duke of Queensberry " in manner foresaid, or any part thereof; nor to grant in- " feftments of liferent, nor annualrent forth of the same, nor " to contract debts, nor do any other fact or deed whatever " whereby the said lands or estate, or any part thereof, may " be adjudged, apprized, or otherwise evicted from them or " any of them; nor by any other manner of way whatsoever " to alter or infringe the order and course of succession " above mentioned." And then afterwards it goes on, " That notwithstanding of the irritant and resolute clauses " above mentioned, it shall be lawful and competent to the " heirs of tailzie above specified, and their foresaids, after " the decease of the said William, Duke of Queensberry, to " set tacks of the said lands and estate during their own " lifetime, or the lifetime of the receiver thereof, the same " being always set without evident diminution of the " rental."

The late Duke, while in possession of the entailed estates, executed leases to certain persons, and, among the rest, he granted a lease of the farm of Wakefield on the 17th Jan. 1801, forming a part of the entailed estate of Neidpath, for forty-seven years from Whitsunday 1800, at the yearly rent of £86. 15s. 2d., besides which the tenant paid the sum of £301 sterling of grassum or entry-money.

Thereafter, and on 23d Nov. 1802, the Duke granted a new lease of the same farm to the same tenant for ninety-seven years from Whitsunday 1802, at the rent of £86. 15s. 2d., besides which, the tenant paid a premium or grassum of £318. 1s. 2d.; and the question was, Whether this last lease was a lease which it was in the power of the late Duke of Queensberry to make, having due regard to the express prohibition against selling, alienating, and disposing the said lands in the clause of the entail above quoted.

This question was brought by himself, while in life, in order to test the validity of the lease so granted. He died in

1813.

DUKE OF
QUEENS-
BERRY'S
TRUSTEES
v.
EARL OF
WHYSS.

1810, having executed other leases, which form the subject of subsequent appeals.

By the appellants it was contended, 1. That according to the law of Scotland entails were to be construed according to fixed principles of interpretation: That by the Duntreath case and other cases it had been settled in law, 1st, That the heir of entail is considered unlimited proprietor of the estate, unless in so far as he is fettered by the prohibitions of the entail. 2dly, That these prohibitions are construed in the most rigorous manner; and, 3dly, That their meaning cannot be extended by implication from other clauses of the entail. 2. Even if leases could be considered in the law to be alienations, the prohibition that the heir shall not *sell, alienate, wadset, nor dispo*ne, does not contain a prohibition to grant leases: for, in legal language, these terms merely characterize a sale or conveyance of the estate, and are terms expressive of a total divestiture of the property, an act altogether different from granting a lease.

3d. Even supposing the words of the clause were taken alternatively, yet a long lease is not in law an alienation. Neither in technical nor in common language, is a lease an alienation. It is a personal contract, leaving the feudal right of property where it was.

4th. The general question was settled in the case of *Les-M. 15536*; *et* *lie v. Orme*, where a lease for 76 years, granted by an heir of entail, was sustained. *Paton's App. Cases, vol. ii. p. 533.*

5th. But here leases are expressly allowed for the liferent of the granter. Thus liferent leases are allowed; and being allowed, they may be granted for any term of endurance within 100 years. The respondents contended,—That though a lease was not an alienation in its own nature, when granted within fair and ordinary administration, yet, if granted for a considerable length of endurance, and for an illusory rent, it was, in point of law, an alienation. The law of Scotland had always distinguished between long leases and those of ordinary duration, by refusing to allow the former, and by sustaining the latter. Wherever there was a prohibition therefore against alienating the estate, these long leases were held to be alienations. Even by the law of England a lease is classed with the modes of alienation, *Black. B. ii. c. 38.*

The Court holding that, under the prohibition to alienate, long leases were comprehended, pronounced this interlocutor, “Sustain the defences, assoilzie the defenders from the conclusions of the declarator, and decern.” On reclaim-
May 14, 1806.
Nov. 17, 1807. ing petition the Court adhered.

Opinions of the Judges :—

LORD JUSTICE CLERK (HOPE).—" If this interlocutor is altered, it opens a door to destroy the whole law of tailzies. There must be room for interpretation of the laws, as there is no law so perfect as to apply *in terminis* to all cases; and construction must often be regulated by the practice of the country. As, for instance, an obligation in a tack to labour according to good husbandry. I don't mind the clamour against entails. (His Lordship here gave some general remarks on the benefit of entails.) I must construe this tailzie by the language used at its date. *That* included long leases under the prohibition to alienate; in other words, under such a prohibition to alienate, long leases were included. Nay, it is the law still, as Mr. Thomson has pleaded. It is admitted, that a very long lease is an alienation. One for 1000 years certainly is so. It is hardly denied that one for 100 years would be so. It is also allowed, that a long lease for the purpose of sub-setting, is struck at. But all long leases end in sub-setting. The tenant becomes a gentleman, and subsets. I can see no difference between ninety-seven years and 100. As to the term to be fixed on, we must go on the usage of the country at the date, as in a question of management and economy as it is at the time. If a long lease is not an alienation, the prohibition is not authorised by the act at all, which enumerates the forbidden acts. If he may grant such a tack, we must sustain an assignation of the whole surplus rents for 100, or 150 years, which will be much more valuable than the principal rents. Farther, the special clause here allowing a liferent lease, *necessarily* implies a limitation, *quoad ultra*; for it would be a mere quibble to say that this does not virtually prohibit all other long leases beyond the value of a liferent."

LORD MEADOWBANK.—" The holders of long leases are a bad species of proprietors. This tack is an alienation in the sense of the statute. It is a sale of the rents for a grassum, and therefore a disposal of the interest of the succeeding heirs in the estate. It may be more difficult to fix the precise term (of a lease that shall not be held an alienation) before hand. As in other cases, we shall come to it by degrees. But in this case, which is an extreme one, I have no doubt whatever that it is an alienation."

LORD CRAIG.—" Long leases would destroy the law of tailzies. The whole difficulty lies in fixing the line (between leases that are and leases that are not alienations.) Further, the special clause here is itself a strong ground. It really amounts to a prohibition of a tack beyond the value of a liferent."

LORD HERMAND.—" I do not think so much of the special clause. It no doubt shows that he intended and believed that he had limited the power. But in this case, as the Duke takes a grassum, I think his tack is substantially a sale of the future rents. I won't go at present so far as the general doctrines of my brethren would go, and it is not necessary to do so."

1813.

DUKE OF
QUEENS-
BERRY'S
TRUSTEES
A.
EARL OF
WEMYSS.

1813.

DUFF
v.
MAGISTRATES
AND TOWN-
COUNCIL OF
INVERNESS.
Ante vol. iii.
p. 686.

LORD PRESIDENT CAMPBELL.—“ This lease is not silent as to the matter in hand. But I shall speak to general doctrines. Is a very long tack within the statute 1621 ? I have looked at all the authorities, even the case of *Scott v. Straiton*, which was sustained in the House of Lords, though it was a lease from nineteen years to other nineteen years, and so on for ever. But the ground of the judgment there was homologation, and long possession for more than eighty years, so that it was safe by prescription. In *Hopeton's* case, the judgment went on a personal objection—on the clause of warrandice undertaken by him. In *Belladrum* (?) was a question with *heirs* : So held both here and in the House of Lords. So I hold that a tack must have an ish to prevail against purchasers. At same time, I should have difficulty to say that a tack for two, three, four, or five, nineteen years, is not good. At same time, that question is not the same as this. It is allowed that a very long term will not be good.”—Vide Hume's Collection of Session Papers.

Against the interlocutors of the Court of Session the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the appeal be, and the same is hereby dismissed, and that the interlocutor complained of be, and the the same is hereby affirmed.

For the Appellants, *Alex. Maconochie, J. H. Mackenzie*.
For the Respondent, *Sir Samuel Romilly, G. Cranstoun*.

NOTE.—This case was decided on the endurance of the lease alone, independent of the grassum. Accordingly, a subsequent question was raised on the Wakefield lease, of this nature : Admitting it to be bad as a lease for ninety-seven years, but no otherwise objectionable, except on account of its duration,—Whether it could be sustained for any shorter period, and for what term,—the entail having conferred power to grant leases during the lifetime of the heir of entail ? This question was involved in the subsequent declarator and reduction, as to the leases granted for grassums, and for alternative periods of duration.—Vide *Infra*.

HUGH ROBERT DUFF, Esq.,	.	<i>Appellant ;</i>
MAGISTRATES AND TOWN-COUNCIL of Inver-	}	<i>Respondents.</i>
ness,		

House of Lords, 13th December 1813.

PROPERTY—COMMON—BOUNDING CHARTER — POSSESSION. — Circumstances in which the appellant claimed a piece of ground, near to the burgh of Inverness, as his absolute property. The respon-

dents stated, in defence, that they held the land as commonfy for the use of the burgh, and had possessed it as such, while the appellant's charter was a bounding charter, which did not entitle him to any thing beyond the bounds. Held the defences good; reversed in the House of Lords.

1813.

DUFF
v.
MAGISTRATES
AND TOWN-
COUNCIL OF
INVERNESS.

An action of declarator of property was raised by the appellant against the respondents, the Magistrates of Inverness, in regard to a piece of marsh ground, or salt marsh, about thirty-five acres in extent, and which formed a narrow stripe surrounded by the property belonging to the appellant, except at the west, where it was limited by the Moray Frith, and east end, where it contracted to a point, and terminated in the river Ness.

It was stated by the appellant that this piece of marsh had, until lately, been subjected to the flow of the tide, which covered it completely at high water. But that the operations of the Caledonian Canal, the bason of which ran along the south side, had excluded the tide on that side, and the raised road, called the Bow Bridge, had kept off the River Ness at the other end, the arable lands of Merkinch having formed the marsh into an island. This island lay almost surrounded by his estate of Muirtown and Merkinch.

This marsh was called the Aban, sometimes the Naban or Carse; and by the title deeds of Merkinch, acquired from the town of Inverness, he contended that these titles did convey and vest in him the said Aban, or piece of marsh ground, as a part and pertinent, and that, in the second place, that this right had been confirmed and explained by possession.

In defence to this action, the respondents stated that the appellant's titles to the lands of Muirtown, on examination, proved that the ground in question could never be acquired as a part and pertinent of these lands, and, with respect to the title deeds of the lands of Merkinch, these last originally belonged to the burgh of Inverness, and that the appellant and Mr. Frazer of Torbreck could acquire no more than was conveyed to them; but so far from the ground having been conveyed to them, it would appear, by the examination of the title deeds of the burgh, and those of the appellant and Mr. Frazer, not only that it never was conveyed to them, but that the same remained with the burgh as a separate tenement, their right to which was uniformly asserted and exercised, as would appear from the evidence both written and parole.—They further stated, that the appellant's titles were of the nature

1813. **DUFF**
v.
MAGISTRATES
AND TOWN-
COUNCIL OF
INVERNESS.
- of a bounding charter, which excluded all beyond the bounds described. That their own titles gave them the Aban, and that they had possessed them, either as a town property or common. And they founded upon a decree of cognition, obtained in 1631, in which the judgment found and declared that the "heal carse of Merkinch, out with the dikes of the "manured lands and rigs thereof, as the flood mark gives "and flows, to be the commonities to the burgh of Inverness in all time coming."
1638. **Muirtown**
Titles.
- In the titles of Muirtown, the marsh is alluded to in the description of these lands thus, "the sea called Roodpoole and "fluddes betwixt the lands of Merkinch and the said lands of "Muirtown at the north, and the water of Ness and the borow ruins of the borough of Inverness, at the east parts respectively, "*cum dominibus, edificiis, hostis, pomaris, silvis, piscariis* lie, *yairis, wraik, weath, wair, carsis, garsingis, toftis, croftis, annexis, connexis, partibus, pendiculis et pertinentis, "addictas terras juste spectat, jacent infra dict. baroniam," &c.*
- The appellant stated, in regard to this grant, that it proved three things, 1st, That the north boundary of these lands of Muirtown is distinctly stated to be "the sea." 2d, That there is here a broad and explicit grant of "parts, "pertinents and pendicles;" and, 3d, That in the anxious enumeration of these parts and pertinents, the Carse is particularly mentioned.
- In 1741 the same lands of Muirtown were conveyed by Mr. Grant, the then proprietor, to the appellant's grandfather. In this disposition the word Corses was omitted, but, in the enumeration of the pertinents, there were expressly named "muirs "and marshes." And, under this disposition, feudal titles were made up, and the lands, with their whole parts and pertinents, possessed for a period beyond the years of prescription.
- Merkinch
Titles.
- 1605.
- The lands of Merkinch, lying on the north side of the Aban, belonged anciently to the town of Inverness. Of this date, the appellant's authors acquired right to one-fourth part of these lands, described as follows: "*Totam et integram "quartem partem villæ et terrarum de Merkinch existen. "quatuor lie oxgate land* antiqui extent, et ad summam sex "solidarum et trium denariorum monete lie mailing, cum "domibus, ædificiis, toftis, croftis, annexis, connexis partibus, pendiculis, et cæteris suis pertinent. cum communi "pastura earundum solita et consueta jacent, intra territorium de Inverness et vicecomitatem ejusdem.*" To be held in feu of the said burgh, for payment of a small feu-

* Sic.

duty, and "per omnes netas metas suas antiquas et divisas
 "pro ut jacent in longitudine et latitudine, limitibus et
 "bondis, solitis et consuetis ex omni parti in domibus, ædi-
 "ficiis, toftis, croftis, annexis, connexis, partibus, pendiculis,
 "et pertinen. earundem; cum communi pasturi solita et
 "consueta, constructis et construendis liberoque introitu et
 "exitu ac cum omnibus aliis et singulis suis libertatibus
 "commoditabus proficiis easiamentis ac tristic, *suis pertinen.*
 "*quibuscunque* tam non nominatis quam nominatis, tam
 "subter terra quam super terram procul, et prope ad pre-
 "dictam quartem partem terræ villæ et terrarum de Merk-
 "inch," &c.

1813.

DUFF
v.MAGISTRATES
AND TOWN-
COUNCIL OF
INVERNESS.

There was no reservation on the part of the town of Inverness, of any burden or servitude, but the title flowing from them was absolute. The other three-fourths of Merkinch estate were feued out by the town to the authors of Mr. Frazer of Torbreck; the oldest charter in this part of the property being conceived in these terms "Totas et
 "integras tres quarturas partes villæ et terrarum de Merk-
 "inch, cum domibus, ædificiis, toftis, croftis, annexis, con-
 "nexis, partibus, pendiculis et cæteris suis pertinentibus,
 "quibuscunque jacentis intra territorium burghi de Inver-
 "ness et vicecomitatem ejusdem."

Aug. 1608.

This charter was without any boundary, and without any servitude or restriction, or reservation whatsoever.

The three subsequent charters belonging to these three-fourths, contained an express conveyance of parts, pendicles, and pertinents, together with "grazings," which latter term could only apply to the flooded grounds, as all the unflooded lands were runrig and arable.

The appellant's quarter of Merkinch, and the three-fourths which belonged to Torbreck, lay thus until the year 1794, when, on the joint application of the two proprietors to the Sheriff, in terms of well known statute, these lands were divided according to a plan prepared under the authority of the Sheriff, who, of this date, found: "from the local

Oct. 2, 1794.

"situation and contiguity of the lands of Merkinch, the ex-
 "change proposed in the petition was expedient; and, for
 "the advantage of both parties, find that the marsh be-
 "tween the said parties ought to be the line shaded on the
 "said plan with blue, and marked with the letters A, B, C,
 "and D, and that the lands and *pasturage* belonging to the
 "petitioner, Alexander Frazer, and situated to the south of
 "the said line, ought to be given to the petitioner, Captain
 "Hugh Robert Duff, in exchange for the lands and pastur-

1813. "age belonging to him, and lying to the north of the said
 "line, and that such exchange would be just and equal for
 "both parties; and authorized them to enter into a contract
 "of excambion accordingly, in terms of the statute." A con-
 "tract of excambion was made out in these terms, of this date;
 "and it was contended by these titles the appellant had ac-
 quired right to the piece of ground in question.

MAGISTRATES
 AND TOWN-
 COUNCIL OF
 INVERNESS.
 Aug. 19, 1796.

The Lord Ordinary (Glenlee) ordered the parties to give in condescendences of what they offered to prove. Upon these being given in, his Lordship, before answer, allowed a proof of possession; and when the proof was reported, he reported the same to the Court with memorials.

From the proof exhibited by the titles of Muirtown, with its parts and pertinents, comprehending the *Carse*, as well as from the titles of Merkinch, the appellant stated, it was established that the piece of ground in question was a part of his absolute property. By the parole evidence he also proved, by his tenantry and others, the long and continued possession of the Aban, by the appellant and his tenants pasturing thereon cattle and sheep without interruption.

Nov. 16, 1808. The Court pronounced this interlocutor: "Upon report
 "of Lord Glenlee, and having advised the mutual informa-
 "tions for the parties, the Lords sustain the defences, as-
 "soilzie the defenders, and decern; find the defenders en-
 "titled to expenses, and appoint an account thereof to
 "be given in, and, when lodged, remit to the auditor of
 "Court to examine the same and to report." On reclaim-
 ing petition the Court adhered.*

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. The appellant, under his titles of Muirtown, is the proprietor of the whole of the Aban, or ground in dispute; and if these titles do not give him the whole of the ground in dispute, that, at the very least, they give him *exclusively* a part thereof. 2. That whatever part of the Aban (if any), which is not the appellant's, by virtue of the Muirtown titles, is his by virtue of his Merkinch titles; he being now the absolute owner of that part of Merkinch which adjoins the Aban. That, in this view of it, the Aban, or ground in dispute, which was flooded twice in the twenty-four hours, may be considered as the boundary between Muirtown and Merkinch; which

* This was come to by a narrow majority.

boundary being now reclaimed from the waters, the same does by law belong to the owners of the opposite banks and shores; and as the appellant unites in his person the ownership of both shores, therefore he is entitled to the whole land in dispute. 3. That the defenders being originally the owners of Merkinch, have, by their feus, granted to the appellant's predecessors, and to the predecessors of Mr. Frazer of Torbeck, (in whose right as to the grounds in question the appellant now stands), parted with their whole property in, and right, benefit, and title to all of Merkinch, without reservation of any right of commony over the grounds in question, or any other reservation whatever, save the feu duties; and, therefore, whatever heretofore belonged to the defenders is now, *quoad* the grounds in dispute, absolutely vested in the appellant. 4. That, on evidence, it appears that the appellant's uninterrupted possession has been in strict conformity to his titles as above described.

Pleaded for the Respondents.—1. The appellant has no right to the ground in dispute, in so far as the lands of Muirtown are concerned, for the charter of these lands being a bounding one, cannot carry any right beyond the bounds mentioned; and, 2. As to the lands of Merkinch, it is sufficient to found on the decree of cognition obtained in 1631, where these very Carse lands are, in a question with Frazer of Torbreck, ordained and declared to belong to the town, as commony in common with him and the appellant. Besides this, there were certain acts of council in 1689 and in 1726, respecting the cutting feal and divot on the common Carse of Merkinch; and the inhabitants of the town, it was proved, had cut turf, and peat, and other materials, from the grounds in question, without molestation; so that, from the evidence adduced, there was no doubt of the exercise of the right on the part of the town.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby reversed. And the Lords find that the appellant is entitled to the property of the whole land in question.

For Appellant, *Sir Samuel Romilly, Charles Wetherall.*
For Respondents, *David Moneypenny, Wm. Adam.*

1813.

DUFF
v.
MAGISTRATES
AND TOWN-
COUNCIL OF
INVERNESS.

1813. (Feu Cause continued, Fac Coll. Vol. xvii. p. 374. et Dow,
Vol. ii. p. 149.)

<p>KER v. DUKE OF ROXBURGHE, &c.</p>	<p>JOHN BELLENDEN KER, Esq., DUKE OF ROXBURGHE,* and JAMES HORNE, Esq., W.S., his Commissioner,</p>	<p>. { }</p>	<p><i>Appellant ;</i> <i>Respondents.</i></p>
--	---	----------------------	---

House of Lords, 18th December 1813.

TAILZIE—CLAUSE—FEUING—ALIENATION—ALTERATION OF THE ORDER OF SUCCESSION.—The Duke of Roxburghe held the Roxburghe estate under a strict entail, prohibiting the heir of entail to sell, alienate, dispone, or to do any deed whereby the estate might be adjudged, or do any other thing to the hurt and prejudice of the said tailzie and succession, reserving to the said heirs of tailzie to grant feus, tacks, and rentals of such parts and portions of the said estate as they shall think fitting, provided the same be not granted in hurt and diminution of the rental. The Duke granted sixteen feus of the whole estate. The question was, Whether these feus were good, or in contravention of the entail? In the first appeal, the case was sent back for reconsideration to the Court of Session. The Court of Session pronounced an interlocutor, stating the special grounds upon which it annulled those feus. The House of Lords affirmed the judgment, on these grounds, that they could not be considered as proper feus made according to the true meaning of the entail, or in the due exercise of the powers therein, nor made with any view to the rational management of the estates; and that the whole deeds and instruments sought to be reduced, when considered as a whole, were to be taken as *alienations* and as *alterations* of the order of succession, under the colour of creating feu-rights.

In the report of this case, ante 609, the facts under which this question arose are stated, which had reference to the late Duke's power to grant the feu-rights under challenge. By the House of Lords the case was there remitted for the reconsideration of the Court of Session, with special directions to the Court, in reviewing their former judgment, and the whole cause, to state the particular grounds or reasons upon which their judgment might be founded.

Accordingly, on the return of the cause to the Court, and on resuming consideration of their interlocutor formerly appealed from, of 12th and 16th January 1808, the Court
18th and 19th June, 1813. ordered mutual cases to be boxed preparatory to a hearing, and, after hearing further argument, the Court, after consulting the other Division, came to affirm the former judg-

* Sir James Norcliffe Innes had now assumed the dignity to which he was held by law entitled.

ment, by a special interlocutor, stating the grounds and reasons of their judgment. (Vide Fac. Col. vol. xvii. p. 374.) These grounds placed their judgment on a wider basis than had been indicated in their former interlocutor.

The opinions of the Judges are printed at great length in the Faculty Collection of Session Papers, (Hume's Collection, vol. cxix. No. 82, 1812-1813.)

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

[THE LORD CHANCELLOR ELDON, after fully detailing the facts, proceeded as follows.]

" My Lords,*

" I come now, with your Lordships' permission, more closely to the Roxburghe case, of which I have stated the facts as well as my memory will enable me to do, and, my Lords, to recapitulate those facts in a very few words, before I proceed to examine the principles and precedents which are supposed to apply to it. In the year 1644, and the year 1648, (I would confine myself to the charter of 1648), there is an entail created of certain lands, and of the earldom of Roxburghe, a tailzie with very great anxiety to preserve both the title and property in that succession of heirs who are (to use the expression there used) called to that succession. There is a clause in it which shows the anxiety of the granter of the estate, though I am quite ready to admit his anxiety must go for nothing if he has not taken the proper means to secure the object of his anxiety. He addressed a sort of prayer to the person then on the throne, to protect his house and family, as he had taken particular care to call to that honour and dignity those who he trusted would persevere in duty and respect to their sovereign.

" My Lords, I here mention again, because it is fit it should not be forgotten, that in the year 1647, certainly about the period of this deed of 1648, but prior to it, the then Earl of Roxburghe had either made or contracted to make,—made, if you please so to take it, and subsequent to that deed of 1648, he had made, either with a view of fulfilling his contracts, or without previous contracts, a great variety of feus. I think in the book before me it is stated that the number of them was about three-score; but they are all feus, as I look at them, of small parts and portions of lands granted to kindly tenants as they call them in the law of Scotland. They are feus, the property not being large, made to persons holding small farms, small vassals. The rental is not large, and in most of them, if not in all of them, the feu-duty upon the entry of the heir and successor is to be doubled; *Sicut usus est* is the expression, or something like that, in these different feus.

" My Lords, from 1648 down to the year 1729, there is little of

1813.

KEB
v.
DUKE OF
ROXBURGHE,
&c.

* Mr. Gurney's short-hand Notes, revised by his Lordship.

1813.

 KER
 v.
 DUKE OF
 ROXBURGHE,
 &c.

fact which is worthy your Lordships' attention, except with respect to the grants of some other feus made by some of the heirs of tailzie. There is a feu which was made as early as 1650 by the same Robert, Earl of Roxburghe, which was a feu of Broomlands and others. It is not necessary for me to enlarge upon the terms of the feu, because, in point of fact, as late as the year 1733 that feu was reduced (as being *ultra vires* of the Earl) by the judgment of the Court of Session, and affirmed by this House. With respect to the small feus it has been represented, and I think very properly, that they are feus granted according to the plain obvious intent of the permissive clause to make feus, the terms of which I shall state to your Lordships by and bye.

" My Lords, in 1663 the then Earl William granted a feu of Greenhead to Sir Andrew Ker. In respect of that feu there has been a great deal of reasoning, tending to show that it was for onerous consideration, that it was a fair and a provident administration of the estate, and a great deal of colourable argument of that sort; but I do not think it unreasonable to say, that it is difficult to reconcile that feu with the terms of this charter. Let us suppose that it was a feu not according to the terms of the charter, it will then be a feu granted in 1663, not according to the terms of the charter, of a particular part or portion of the estate, a larger part or portion than in that way of putting it should have been granted in one feu; but then the utmost which can be stated with respect to it is, that there was one feu granted in that year 1663 of a part of the estate, too large to be made the subject of one feu according to the terms of this charter, but that it is utterly impossible, that because that Earl William made that one feu, and that one feu has been submitted to by the family, the feus in question must therefore necessarily be consented to likewise. There was likewise a feu made in the year 1742 of about twelve acres, lying on the south side of the Canon-gate of Edinburgh; and with respect to that feu, although it appears to have been made on the site of a dilapidated mansion-house, it would have been very difficult to have affected that feu, as a feu not made in the due exercise of the power of feuing; but if you take it to be so in that way of putting the case, it is one feu granted not in the due exercise of the power in addition to that other one, and then the question is, whether those two deeds prove more than this, that the owner of the property made feus which could not be supported? That Earl William granted in 1663 feus which could not be supported, and that Duke Robert granted other feus in 1742 which could not be supported, but that they granted them under the notion that they could be supported; and the question then is, whether their notion that they could be supported is, aye or no, supported by the tailzie and charter under which they hold? and even if they could make them consonant with that authority, there would remain the question, whether such feus as were made in 1804 could possibly stand?

" My Lords, I need not tell your Lordships, that in the year 1729 there was an entail made of other estates, which comprehended as

additional property in the effect of the old entail ; and that in the year 1740 there was another addition to the entailed property, which became comprehended under the old entail ; and I think in the year 1747 it was that a certain property, which had been in wadset in order to pay the debts of one of the family, was redeemed, and that was settled also so as to be brought under the terms of the old entail.

“ On the death of the last Duke but one, the last Duke (who was the author of these feus) came into the possession of the estate. And coming into the possession of the estate, in the course of eighteen months previous to his death he executed, first a trust-disposition on the 18th of June 1804, for the purpose of creating the means of making very large payments, which were there provided for. On the same 18th of June 1804 he executed his first deed of entail ; and then, in the month of September 1804, he executed these sixteen feus, the validity of which is now in question ; and which sixteen feus, your Lordships will permit me just to remind you, did in fact vest in those who were to take the benefit of these fees, (the instruments being upon the face of them pure feus), the whole beneficial property of the estate of Roxburghe, with the exception only of the mansion-house of Fleurs ; with no exception of the mansion-house at Broxmouth ; with no exception of the mansion-house at Greenhill ; with no exception of the mansion-house of Byre-cleugh ; and that mansion-house at Fleurs being excepted, together with forty-seven acres, only parcel of a property containing sixty thousand acres, and liberty of ingress and egress for the Dukes of Roxburghe to this house so reserved to them, with forty-seven acres.

“ My Lords, these deeds are all made upon the same day ; they are all made by the same person ; they all contain, I think, nearly the same clauses ; they are stated to be made in consideration of the feu-farm duty, and for other onerous considerations ; terms, the generality of which is not explained by any thing to be found in the cases, but which have been said to be capable of explanation, and actually explained by what appears upon these deeds. There was executed upon this same 26th of September 1804 a contract of entail with respect to those feus ; that is to say, Mr. Gawler thereby contracted, that there should be an entail made of these feus ; which entail would in truth give the substance of that interest which the persons marked out were to take under the entail of the 18th of June 1804, to the very same persons, if those persons could not take the benefit of that entail, or of any other entail which might be executed by the Duke in the course of his lifetime, and they might be found ineffectual after his death ; and all these feus are subject to what have been called irritancies ; *first*, If the Duke should have any descendants of his own body ; *secondly*, If he did not leave descendants of his own body, if the entail, that he had executed, or any other entails which he should execute, should be found to be effectual dispositions, not *ultra vires*, not contrary to the power he had in the deeds of 1648 and 1747.

“ My Lords, these have been called irritancies ; and it has been

1813.

HER
C.
DUKE OF
ROXBURGHE,
&c.

1813.

KEE
v.
DUKE OF
ROXBURGHE,
&c.

argued, that they are so, and that it is no objection to the granting of a feu that it contains such irritancies as these; but your Lordships will be pleased to attend to the further circumstance, that this contract of entail, of even date, which provided an actual entail to be made within ten days, and which actual entail was made on the very same day, the 26th of September 1804, provides further, that the Duke of Roxburghe shall in effect have the whole beneficial enjoyment of the estate during his own life; that he shall take all the surplus rents, notwithstanding by the feus the entry of the grantee of the feus was to be at Martinmas then next; that he shall have all the surplus rents; that he shall have the possession of all he chooses to have in his actual possession; that he shall have power to enter and cut down wood; in short, even if the property was transferred, he had, in point of substance under this agreement, during the lifetime of Mr. Gawler, unquestionably the *dominium utile* of all these estates. I have before stated to your Lordships, that in my view of this case I should consider the seisin of infestment to have been properly taken in the lifetime of the Duke; the possession to have been delivered in the lifetime of the Duke; and that the charter of entail, together with the contract of entail, had appeared to the world before the Duke ceased to exist; it is not in my view very material to consider how these facts stand, one way or the other.

“Such, my Lords, being the state of the case of the Duke of Roxburghe, in these two years, 1804 and 1805, having at that time an estate partly in his natural possession and partly enjoying it by means of rents paid him, and which, I will suppose, in illustration of the argument, to amount to about £20,000 a-year, makes feus of the whole interest in the estate beyond that income of £20,000 a-year; and here I must take the liberty shortly to put your Lordships in mind again of those passages to be found in the entail and the feus, and in the agreements respecting that entail, and respecting the obligations Mr. Gawler came under. I must put your Lordships again in mind that it has been argued, and, I think, satisfactorily argued, that the provisions of that entail and the other deeds are such, that the act of the Duke cannot be considered, at least in my judgment, as an act the benefit of which was purchased by Mr. Gawler, but an act of gift on the part of his Grace, the obligations of Mr. Gawler being expressed, and being provided for by the very terms under which he takes the estate, and by which he comes under obligation to make these several payments.

“My Lords, having stated this much to your Lordships, as one noble Lord is present now who was not before, I will just add this circumstance, that after this the Duke takes upon himself, as heritable proprietor of the estate, to make a deed of entail both of the superiority and of the property, and he gives a factory to a gentleman of the name of Seton Karr to act as his general agent of this estate pretty much as if it was his own; and he actually executes, I think, five leases, but it is immaterial whether three or five leases, parts of the estate by those leases denominated (to use an English word)

the *dominium utile* of the subjects leased to tenants, who take directly from him by his act, whereas he had no title at all of the feus in law and equity, passed an immediate beneficial interest *in presenti*, to the person who was the grantee in these feus: He had no interest whatever to convey to those tenants; he reserves those surplus rents which, upon the face of these feus, were to be Mr. Gawler's, but which, by the effect of the collateral contract, were to be the Duke's; the Duke being to give discharges, as your Lordships recollect, to Mr. Gawler for those surplus rents. He reserves the rents, not to the persons to whom he passed the *dominium utile*; he reserves those rents to himself, his heirs and assigns, and he dies in the natural possession of these estates.

" My Lords, the true question before your Lordships I take to be this, whether this transaction, constituted,—I do not say of these sixteen feus,—but whether this transaction, constituted by all these deeds, and under all these circumstances, amounts to an exercise of the power of feuing, such as is given by this charter of 1648, and given nearly in similar terms, with some small variation of expression, which I do not think very material as to the words rent and rental in the subsequent deeds of 1729, 1740, and 1747; whether this transaction amounts to such an exercise of the power of feuing, contained in the charter of 1648, as a Court of Justice can say is the true and proper exercise of the power of feuing contained in the charter of 1648 and the subsequent charters. My Lords, I apprehend when I say this transaction, I am fully entitled to say so, for I apprehend, according to all law, if you are to look at the real nature of a transaction, you must not look at its parts as distinct and altogether separate from its effect as a whole. Deeds and instruments executed at the same time, relative to the same property, connected with the same powers, various as they may be in their number, we may construe as one transaction. Then this transaction, my Lords, appears to me to amount to this. The Duke of Roxburghe certainly meant, and I am sure I need not, after what I stated on Wednesday, state to your Lordships, that I do really and sincerely wish that he had meant somewhat less, and done something more effectually; he certainly meant to change the series of heirs that were to take under the charter of 1648, and the other charters. That he meant so to do, appears from the recitals he has mentioned in his trust dispositions; that he was not fettered like the prior heirs of tailzie; that being the last heir of tailzie named, he had power, as he would have had if he had been correct in the fact, that he had a power beyond the heirs of tailzie mentioned in the charter, that he meant therefore to change the whole series of heirs; and without entering at all into any observation upon his motives, I say no more about them than this, it is far too delicate a thing for a Judge to trust himself with determining whether the motives with which a man executes a power which he has, or conceives he has, are motives which should lead him to the execution of that power; or whether motives of a higher nature should have restricted him from taking advantage of his legal rights. That is a

1813.

KER
v.
DUKE OF
ROXBURGHE,
&c.

1813.

KEB
v
DUKE OF
ROXBURGHE,
&c.

question with which Judges have nothing to do; but if they had any thing to do with it, it appears to me from the whole of this cause, that the Duke was under a moral obligation to do something for the persons for whom he meant to provide by the effect of this act.

“ My Lords, you will permit me to call your attention to the charter of 1648, as far as it contains the prohibitory clause, and the permissive clause upon which you are to determine. My Lords, the prohibitory clause was in these words; and I mention again that the irritant and resolute clauses go as far as the prohibitory clause:— ‘ It shall not be lawful to the personnes before designit, and the ‘ airis male of their bodies, nor to the otheris airis of tallie above ‘ written, to make or grant any alienatioun, dispositioun, or either ‘ richt or security qtsumever of the saidis landis, lordschip, barones, ‘ estait, and leiving above spe’it, nor of na part thereof; neither zit ‘ to contract debtis, nor do ony deides qreby the samyn, or any part ‘ yairof may be apprised, adjudget, or evicted frae thame; nor zit to ‘ do ony uther thing in hurt and prejudice of thir pntis, and of the ‘ foresaid tallie and succession, in haill or in pairt; all quhilkis ‘ deides, sua ta be done be thame, are be thir pntis, declarit to ‘ be null, and of nane availl, force, nor effect.’ Here, my Lords, we are not puzzled with the same question as that which presented itself in the Duke of Queensberry’s case, because there appears to be no dispute that this prohibition of alienation will amount to a prohibition of feuing as an alienation, although under the contract and lease nothing passed but a sort of conventional right to take the profits. Nobody doubts that under a feu duly executed, with seisin and infeftments, the property is actually transferred. Alienation therefore was prohibited, and if your Lordships will look at Erskine and Stair I think you will find, that it became necessary upon grounds of a prudential kind, to provide what was to be done for the improvement of the estate; in fact, what was to be done in the article to a certain degree of letting loose the parties prohibited from the effects of the express prohibitions.

“ If your Lordships look to Erskine and Stair you will find, that it was the demands of agriculture that necessarily suggested the propriety of giving leave to make leases of some duration, and that it was the same consideration which suggested the circumstance of granting these feus; granting feus, under a permission to be looked at, at least *prima facie*, as a provision consistent with the prohibition to alienate.

“ My Lords, Stair and Erskine have passages to this effect:— ‘ Infeftments feu are like to the emphyteusis in the civil law, which ‘ was a kind of location, having in it a pension as the hire, with a ‘ condition of planting and policy, for such were commonly granted ‘ of barren grounds, and therefore it still retains that name also, and ‘ is accounted and called an assedation or location in our law; but ‘ because such cannot be hereditary and perpetual, all rentals and ‘ tacks necessarily requiring an ish,’ that is, conclusion and termination; ‘ therefore, these feu-holdings partake both of infeft-

'ments as passing by seisin to heirs for ever, and of locations as 'having a pension or rent for them *reddendo*, and are allowed to be 'perpetual for the increase of planting and policy;' and, accordingly, in a case, I think, of Elphinstone against Campbell, or some such name, your Lordships may recollect, Lord Thurlow stated, that these feus, when they came to be applied to the purposes of agriculture, were in little more acceptance in the law of Scotland, than common tacks were; those, I think, were his words.

"Your Lordships know, that the use which Earl Robert, about 1647 and 1648, made of this power in the original charter 1644, was to grant certain feus, which seem to have been granted in the very terms, I think, which the provision contained in this charter permitted feus of the very nature and essence which this charter meant to provide for. The permission is in these words: 'Reserving libertie and privilege to our saids airis of taillie to grant 'feuis, tackis, and rentallis.' Your Lordships observe, it is not merely a provision to grant feus, but it is by virtue of the same permission that there is the liberty, not merely to grant feus, but to grant feus, tacks, and rentals; and it was upon that ground that I once submitted to your Lordships, that you must put such a construction on this clause as not only to make the clause consistent with the nature of the feus, but also to make the clause consistent with the nature of those other grants which it authorises; 'the 'grants of tackis and rentallis of sik parts and portions of the 'said estait and leiving as they shall think fitting, providing the 'samyn be not maid nor grantit in hurt and diminutioun of the 'rentall of the samyn landis and utheris forsaidis, as the samyn sall 'happen to pay the tyme that the saidis airis sall succeed yerto.'

"My Lords, I will, in the *first* place, discharge myself of such very few observations as I mean to make to your Lordships with reference to that part of this clause of permission which relates to the rentals. Your Lordships know that a question has been raised, whether these feus have been made with a due attention to the condition, that the feu-duty to be rendered was not to be less than the rental, as it is here called, or, in the subsequent charter, the rent, upon the distinction of which I lay no stress; but whether sufficient attention had been paid to that condition of the permissive clause which relates to what was to be the quantum of the feu-duty? My Lords, when I say whether attention had been paid, I do not mean whether attention had been paid by those who drew these instruments, who were the actual conveyancers, because I think, after reading them, as I did the day before yesterday, and pointing your Lordships' attention to the *reddendo* of the feu-duty, it is impossible not to see that every person who was concerned in drawing these sixteen feu-deeds aimed at a compliance with this condition about the rental in the granting of every one of these feus; for though every one of the subjects feued are stated to be in the actual possession of the person feuing, many of them do not appear to have been let at any rent. Some do, but many of them do not appear

1813.

K. B.
v.
DUKE OF
ROXBURGHE,
&c.

1813,

KERR
v.
DUKE OF
ROXBURGH,
&c.

to have been let at any rent at the time the succession opened to that Duke, who was the granter of these feus ; yet they are all of them granted with a feu-duty averred in the instrument itself to be the money rental ; either the present money rental, which would not be a strict compliance with the terms, or the money rental at the time of the Duke's succession. When I said that a question had arisen, whether sufficient attention had been paid to this, I meant to refer to what had passed in these proceedings when this was argued in the Court of Session. When it was argued here on appeal, and again in the Court of Session, a sort of doubt was created in my own mind, which led me to suggest, that there might be considerable difficulty in supporting these feus with reference to the question, whether there had been such a punctual observance of this condition as was necessary to give validity to it, and the Judges having been called to state what were their special as well as their general objections to these feus, a great majority of them have agreed that these feus are bad, as far as they either comprehend only lands that were not in the possession of persons paying a rental at the time the last Duke succeeded, or that they are bad, so far as they comprehend lands which were partly in the possession of tenants paying a rent, and partly in the possession of the late Duke ; and that where there is a feu of property which was unentailed together with property which was entailed, and where there is a *cumulo* rent for both, and no distinction taken between what was to be paid for one and what for another, it is bad ; and a great majority of the Judges have determined, that upon this ground alone these feus cannot be sustained.

“ My Lords, the species of consideration which I adverted to in the beginning of this case, leads me into a situation, I confess, of some singularity and awkwardness with respect to this point. The point was originally suggested by myself. I suggested it, prompted to do so by what I apprehended to be the law of England, not knowing it to be the law of Scotland, in reference to reservation of rents. It may be in the recollection of your Lordships that I stated this. If a man has one house in St James's Square, of which he is a tenant for life with a power of leasing, and, being entitled in fee to the next house, he chooses to make a lease of the two with one *cumulo* rent, without distinguishing what rent was to be paid for the other ; no Court could say this should be good for the one and bad for the other, and that they would set it aside for the excess ; and the reason why they could not set it aside for the excess alone, as it seems to me, is this, that if parties enter into what is called a bargain, if the terms of the bargain do not finally prevail between the bargainer and the bargainee, a Court of Justice has no right to substitute other terms and to introduce a new contract. It appeared to me also, having regard to what our law was, that if a person having a power of leasing was desirous to reserve a particular rent, he must reserve that particular rent, and it must appear upon the face of his instrument that he does reserve that particular rent, because the man is

take after him has a right to know from his act what it is he has done.

1813.

KER
v.
DUKE OF
ROXBURGHE,
&c.

“ Cases were cited to your Lordships of this sort, where there was a general power of leasing given in our law and the ancient rent was to be reserved, but where the power of leasing was general as to lands which never had been let, and also as to lands which had been let, and cases were cited, proving that a convenient construction had been made by the Courts of Justice, who have said that where the power was general it should be applied to such lands as it could be applied to, but that the condition should not be insisted upon as to those lands with reference to which the condition had no application, because they never had before been let ; and they have varied, I think, in what they have required in the execution of such a power as that, with reference to the fact that they could be let for more rent. The question has been raised, whether, where there had been no rent reserved for a part, you are to add to the ancient rent something for the premises not before let ? or, whether you are to reserve for that a proper, fair, and reasonable rent ? And the result of all the cases is not very easily reconcileable, God knows, but the result is, that all these powers are to be construed according to the intent of the parties. Now, my Lords, it does not appear to me to be by any means necessary that we should decide this point, unless we should happen to differ upon some other grounds to be proposed to your Lordships for the judgment in this case ; for although it was your Lordships’ wish to know, by the statement of the Judges in the Court of Session themselves, what was the nature of their general objections, and what was the nature of their special objections, that request was more, on your Lordships’ part, for the purpose of supplying what you thought a defect in the judgment you had before, viz. that you did not know the grounds upon which they proceeded, than on any notion that we were to affirm every *ratio decidendi* that the Judges had communicated to us as the grounds of their opinion. They state reasons in which they are mostly agreed ; they are, in my opinion, sufficient to justify the conclusion at which they have arrived. There are also special objections, which they think apply to each and every of them upon both grounds. I conceive their judgment is right ; but it is not necessary that we should adopt their judgment upon all the grounds. I lay, therefore, out of the case the rental for the present moment.

“ But, my Lords, I cannot help calling your Lordships’ attention to another view of the case, which is this ;—It is now contended, that, consistently with this deed, the late Duke of Roxburghe could give away from the series of heirs called in the deed of 1648, and to a class of heirs whose interest was not contemplated by that deed of 1648, the whole of the *dominium utile ultra* the value, because we may put that construction, for the purpose of stating what I am about to state : *Ultra* the value of what this estate was at the time of that Duke himself succeeding to it. And if he, who enjoyed it during so very short a period, could do so, you must also say, that if an

1813.

 KRB
 v.
 DUKE OF
 ROXBURGHE,
 &c.

infant came in as the heir of tailzie, and lived ninety-nine years, notwithstanding the whole course of improvement that might be made in the course of so long a period as that, you must say, that the same rules of construction, that just before he was dropping into his grave he could give away, not merely the *dominium utile* beyond the value of the property when he was in his ninety-ninth year, but the *dominium utile* beyond the value of it at the time of his succeeding to the estate.

“ But, my Lords, in construing this case for the general purpose of seeing whether a due exercise has been made of this power, you must make up your minds to say, what was a due exercise of a power not containing this provision, that the rental of the feu should be equal to the rental of the estate at the time the granter of the feu succeeded to that estate. Let me suppose, that there was no such condition in this deed, what is the construction contended for to support these feus? If this condition did not stand part of this permissive clause, the consequence would be this, that the power of feuing would be without any limit whatever; the feus certainly must have this limit, they must have the limit which is prescribed by the necessity of there being, in the body of the feu, all the requisites of a feu; there must be some rent; but the consequence would be this, that if the terms of the permissive power did not require an attention to a given rent, if there was no such condition in it, the construction of the power of feuing being contained in a deed prohibiting alienation, feuing being one species of alienation, the tenant for life, under all those anxious words I have read to your Lordships, would have nothing to do but to say, I am prohibited from alienating, but I am not prohibited from feuing. I will therefore feu out directly the whole *dominium utile* of the estate, *reddendo* a capon, *reddendo* a fowl, or *reddendo* a Scotch pound; and yet that is a due exercise of the power of feuing under a deed prohibiting alienation of the estate, or of any part of it.

“ Your Lordships must also look at this, not merely as being a clause permitting feus to be made, but as a clause permitting tacks to be made, and permitting rentals to be made; and how will you ever put such a construction upon this power, as to say you may give away the whole *dominium utile* in the form of a feu, and yet it is impossible to grant a lease of more than ordinary endurance, and it is impossible to grant a rental of more than ordinary endurance? That, I apprehend, is impossible. You must, therefore, at least this cannot be denied in argument—you must, if you look at the permissive clause alone, make such a construction of the permissive clause, and all the terms of the permissive clause, as is suitable and fitting to the terms of that clause taken alone; but you are not only to make it suitable and fitting to the terms of that clause taken alone, but you are also to make it such a construction as is suitable to the whole of the instrument taken together. Now, my Lords, that is a most material part of the case. I say, to the whole of the instrument taken together; and when I say the whole

of the instrument taken together, I have now your Lordships' authority upon the question as to the variance of the entail of 1648; that, looking at the whole of the instrument taken together, is not breaking down any of the decisions or the doctrines laid down as to the construction of fetters on an entail, and the imposing fetters by implication; but there is no ground here for saying you are imposing fetters by implication. The question is not, what fetters are imposed, but what fetters are taken off; the fetters are imposed by the prohibition to alienate; it is in the permissive clause that the fetters are taken off: and I quite agree, that you are to look at the fetters as taken off to the very extent to which the fair construction of those terms that remove the fetters will bear you out; but you are not to make such a construction of that permissive clause as for it to operate to let the party loose from prohibition. You are not to make such a construction of that permissive clause as to destroy altogether substantially the effect of the prohibitory clause. Here is a prohibition to alienate;—to feu is to alienate. Then there is a prohibition to feu; but here is a permission to feu. What then is to be the effect of that permission to feu? Is it to destroy that prohibition altogether, or to be construed as consistent with it? Must it not be construed as a permission, the nature of which is to be collected and gathered from the purposes for which it is given, and to be collected and gathered from the purposes to which the power given in the other clause can possibly be applied?

“My Lords, I put the case again, What would possibly be the meaning of prohibiting all alienation, if the intent was, that in feuing you might accomplish all alienation? because this is extremely clear, that if Earl Robert, who made this in 1648, had died the next day, and then Sir William Drummond, who succeeded, had come into possession upon the succeeding day, a fact which might have happened, upon this construction Earl William would have had nothing more to do than to say this,—I will make up my titles under the deed of 1648; I cannot sell any part; I cannot alienate an acre of it; I cannot dispoise a rood of it; I cannot contract any debt that can affect it; I can do nothing which shall authorise those entitled to the succession after me to say that as to half an acre of it I have altered the course of succession:—But this I can do, Earl Robert yesterday being in possession of 60,000 acres, which 60,000 acres yielded yesterday, and this morning, when I succeeded to the estate, for the sake of the argument I will say £500 a-year, I can feu, reserving the rental paid this morning; I cannot alienate. I can do none of those acts which would come under that term; but I can do this,—I can immediately make one feu of the whole estate, reserving only that £500 a-year rent; and so I can give away the estate for ever; and by making a feu I can destroy for ever the exercise of this power which my author yesterday meant I should exercise for the benefit of the estate as to rentals and as to leases. Nay, I can do this, I can give away this estate for ever in the shape of a feu, paying a feu-duty of £500 a-year, and yet I cannot make

1813.

KER
F.
DUKE OF
ROXBURGH,
&c.

1813.

 KER
 &
 DUKE OF
 ROXBURGHE,
 & C.

a lease for 99 years, making a provision for that £500 a-year during the term. Why? Because your power of granting leases is to be used only in the exercise of a proper administration, not for the purpose of destroying, but of supporting the entail, it being a power given to you for the purpose of supporting the entail. Then, my Lords, without more in the case than that these sixteen feus were executed upon the same day, I care not whether to the same person or not, but that they were executed on the same day, with the additional fact that they were in favour of the same person, and that they were in truth a gift of all the surplus rents of this estate for ever in perpetuity,—I should say, that upon that ground alone it was impossible that this transaction could stand.

“ My Lords, it is impossible for me to say that I can give my consent to the doctrine which says that you are not to look at the real nature of the thing that is done, you are to look to see what is the nature of the thing apparently done, and if you find these sixteen feus supportable with reference to rent, supportable though woods are granted, supportable though mines are granted, supportable though they grant all those things which, according to the books, are very seldom capable of being granted, and absurd it would be if they were capable of being granted; if notwithstanding the special objections they are capable of being supported, you are to look at the nature of the transaction. A feu I apprehend to be of this sort; a man constituting himself the superior, and the other his vassal, owing, from the moment he becomes such, duties, and duties known to the law, and standing in a relation which furnishes obligations, as between those persons flowing out of a present interest, are to be presently and immediately attended to and discharged. Was that so here? My Lords, I should be glad to ask this question, Whether any man could doubt what the nature of the transaction was, if all these feus had been in one instrument, and the contract for the entail of the feus, and the actual execution of that contract, had been embodied in one and the same, and there had been embodied in the same deed a stipulation and provision that the Duke was to make himself superior, who by the terms of the deed was to part with the *dominium utile*, and that Mr. Gawler, by the effect of the feus, was to become the vassal, and, *ipsissimis terminis*, to entitle himself to the surplus rent from Martinmas thereafter; and if instead of any such relation being carried on, the Duke remained the substantial owner of the property during the remainder of his life, receiving all those surplus rents and profits, dealing with the estate as his own, leasing and reserving rents payable to himself in deeds to which Mr. Gawler himself is an attesting witness? Why, my Lords, I repeat again what I said the day before yesterday, I should think much less respectfully of Mr. Gawler than I do, if I could suppose that, in a transaction with a person meaning to be somehow or other very largely his benefactor, at a period which could not be very far distant, and was not far distant from the period when these leases were executed, he could have interposed himself against these purposes of the Duke; but it

is quite impossible not to look at facts of this sort, as evidence of what was the real nature of the transaction.

“ My Lords, It is said that it might very well be that these two irritancies should be reserved in all the feus ; that is, that the feu was to be void if there was an entail under which the grantee of the Duke was to take, or if the Duke had descendants of his own body. My Lords, I do not mean to say, that if these are to be looked at as pure irritancies, you may not reject the condition on which the feu is to become void, but you cannot do that without examining what they really are. Now, if Mr. Gawler had taken possession at Martinmas 1804, as he was destined to do ;—if Mr. Gawler had been the person really enjoying the *dominium utile* ;—if the enjoyment had been according to the instruments ;—if there had not been that sort of contract as to the interim enjoyment, which is a species of contract which, as it appears to me, goes a great way to destroy the whole relation of superior and vassal,—if there had been that singularity which left it at the death of the Duke a question which no person could decide, whether Mr. Gawler was superior or vassal, these might be called irritancies ; but I say these are parts of the transaction : and when you come to see the contract for the entail, and the entail itself, but particularly the contract for the entail, which decides, what is the intention of granting the feus, the feus themselves being quite silent as to the intention with which they are granted, and then see that the intention was to make an entail upon that series of heirs, who were to take under the entail of the Duke, if the entail of the Duke could stand good : I say, the intent of this transaction was neither more nor less than this ;—that it was, under the colour of leasing, in sixteen feus to convey this estate. And it is not immaterial that there were sixteen feus, because that shows to demonstration what must have been thought of the effect of the words, ‘ such parts and portions ;’ but when you see the whole *dominium utile* of the estate feued away, and feued away upon principles which cannot sustain these feus unless they would sustain a deed if there had been a rental of £500 in the case I before put, or if there had been no condition with respect to the rental, the question your Lordships are to look at is this, whether the real and actual intent of this transaction, taken altogether, was not this : I am determined to alter the order of succession : If I cannot alter the order of succession by the effect of my entail, I will alter the order of succession by granting, and that is the substance of the thing, by granting these feus, which shall operate exactly as if I alienated the estate contrary to the prohibition itself. It is, my Lords, upon grounds of this nature, which I am sure I could enlarge upon till your Lordships would be as much fatigued as I am myself ; it is upon grounds of this nature I am of opinion that upon general reasons these feus cannot stand ; and from my heart I declare, I am sorry part of them cannot stand, but I must act according to my judgment : I am governed by nothing else. It does appear to me, that this power of feuing was a power given as

1813.

KEB
v.
DUKE OF
ROXBURGHE,
&c.

1813.

 KER
 v.
 DUKE OF
 ROXBURGHE,
 &c.

a power of leasing is given (for it is the same power), to be exercised in the reasonable administration of the estate for the benefit and support of the tailzie, and upon that ground I should have thought that, independently of the other transactions, these sixteen feus, which I look at as one feu, could not be sustained. Again I think, that the real nature of this transaction was under the colour of feus, not to feu, but to give the substance of the estate to another course, order, and series of heirs, than those who, under the entail of 1648 and the subsequent entails, were to take that estate; that the law will not permit that to be done under that colour; and therefore also I think these feus are void.

“ My Lords, I do not enter here into the other reasons of special objection. I say nothing about feuing the mines, about feuing the woods, and about feuing what never had been let; for in the formation of my own individual opinion it is not necessary, and I know, generally speaking, it is dangerous to determine points which are abstract points and not necessary; but it is quite impossible to pass by leases of mines, and woods, and lands never let before, and so on, without saying this at least, that they must be regarded as circumstances and as facts which have a tendency to show what was the real nature and the real object of this transaction. Now, my Lords, that the Duke himself could not have any notion that this was an act of prudential administration of the estate, is clear enough; it is demonstrated by all he did himself, with respect to the entail of the feus; his requiring an entail of the feus by the contract between him and Mr. Gawler, which entail is created by a contemporaneous deed, for it is of the same date, and executed on the same day, and is part of the same transaction, is decisive to show, that the Duke never meant to make a feu to Mr. Gawler, but that he meant in another form to make a new entail; and that is proved by the acts of the Duke himself, with respect to those entails which he made, both as to the superiority and the property, subsequent to the grant of these feus, in order to take the chance of the feus falling under what has been called, in the course of this cause, the second irritancy; entails which do not give to Mr. Gawler the interest he was to take under the feus, as feus, but which are calculated to give, and are drawn up not to give to Mr. Gawler as a vassal a feu of the estate, but to introduce a new series of heirs, taking both the superiority and the property, whereas, in the other case, they were to take the property only.

“ My Lords, I do not advert here to several cases which have been alluded to, though some of them are material to be attended to in my opinion of this case. I stated formerly in this case, when this matter was before us, that I thought the Greenock case could be accounted for without looking at it as a direct precedent. The idea floating in my mind, when I so expressed myself, was this: If your Lordships recollect, the word there was ‘ alienation,’ and feuing was there admitted to be alienation; but the words were, that he should have liberty to feu ‘ sic parts and portions of the estate;’ the very same

terms that occur here, and terms which I cannot help feeling are expressive of no such purpose in the mind of him that used them, as that feus should be made of the whole of the estate, which by one lumping clause was declared incapable of alienation, either in whole or in part; the words were the same there; but then the *reddendo* was, for the houses so much rent reserved; for the gardens so much rent reserved; and one principal question was, Whether the feu of the western barony was good? So far that is an authority, because it was held in that case that the western barony could not be feued, notwithstanding there was that reservation, because the nature of the reservation showed, that the intent of the permissive power was only that land should be feued upon which there could be erected houses and buildings; and it not being at that time probable that houses and buildings would be erected on that farm which formed the western barony, the House of Lords held that that feu was bad, not entering into the question, whether the time might ever come when that western barony might be feued, reserving so much for the fall of houses, and so much for the fall of lands; that at that time there was no idea that that western barony could be applied to any such purpose; and they collected from the terms of the *reddendo* in the permissive clause of feuing what was the liberty meant to be given, and they cut down the feu of the western barony for that reason; a feu which, from what I have read in these cases, I have very little doubt the same House of Lords would at this very moment permit to be made as an extremely good feu, because, from some of the papers I have before me, I see buildings have got to that western barony, and it might properly at this time of day be applied to those purposes. What then is the meaning of that judgment? that where there is such a permission of feuing, it must be looked at consistently with the prohibition of alienation, and that the power of feuing must be exercised for those purposes which are consistent with the prohibition of alienation; or it must be exercised, in other words, in the rational administration of the estate, or it must be exercised, in other words, for the beneficial purposes in respect of which it is given.

“ It is upon these grounds, my Lords, that I shall in the course of to-morrow propose to your Lordships a finding, to which I should wish to give half an hour’s more attention, which, conceiving it as I do, unnecessary to decide upon the special objections, will state the general grounds upon which it humbly appears to me, much as I shall feel when I pronounce those words, it does appear to me these feus cannot be sustained; and therefore, stating in precise terms those general grounds, I shall propose to your Lordships, upon that statement, to affirm the interlocutors of the Court of Session now before you.

“ My Lords, in stating this much to your Lordships, I can only add, that if I am in an error in this business, I protest to God I do not know how to extricate myself from it. I have endeavoured to look at this case in such a way as to support the whole or some of

1813.

KRR
v.
DUKE OF
ROXBURGHE,
&c.

1813.

—
KER
v.
DUKE OF
ROXBURGHE,
&c.

these feus. I have endeavoured to do it with an anxiety that I believe I never felt before in the whole course of my judicial duty; more particularly an anxiety to support some part; and I have looked again and again at all that I have been able to find in these papers: at all that I have been able to find in Scotch books; at all that I have been able to find in English books; I have tormented my mind with all the reasoning in which I could employ that mind, to find out whether this was a case in which I could do that, or the Court of Session could do that which the Courts can do in a case of competent portions, and so on, whether they could say, though these feus are bad for the whole, yet they may be reduced in point of excess: and I thought at one time that I had got hold of the means of doing so, for I found, as your Lordships may recollect, in this contract of entail, a clause, that if from any unforeseen causes these feus or any of them should be reduced, Mr. Gawler's obligations were to be lessened exactly in proportion to the value he lost by such reduction. I therefore thought the author of these feus had been contemplating a case which might be put as a case of excess, nevertheless leaving something which could be supported: but, my Lords, I cannot tell where to find any rule upon which I can say what is excessive, and what is not excessive. The transaction appears to me one entire transaction. It appears to me to have no distinct parts which I can lay hold of for this purpose, either in the contemplation of the granter or in the contemplation of the receiver of the feus.

"With respect to the feus of Fleurs and Broxmouth, all the Judges have agreed, (and agreed, I think upon sufficient authority, which affirms this doctrine of the rational administration of the estate), that those two feus of property on which the mansion-houses stand, are, as I collect their sentiments, bad. Why? Because, in the *first* place, the law of Scotland will not allow a mansion-house to be feued; and because, in the *next* place, it is absurd to say a mansion-house shall not be feued, and yet that it can be supposed to consist with any rational purpose in the mind of the person creating the deed of tailzie, that the mansion-house shall not be feued, but that the lands around it shall be feued; that the estate usually held with it shall be feued; that the mansion, in other words, shall be turned into a stone-quarry, and, as it was attempted by one of these feus, that the Duke of Roxburghe, as owner, should not have the liberty to go into and out of that mansion-house, without express permission of ingress and egress.

"My Lords, These two are capable of distinction from the rest; but on general grounds, I really cannot think they are capable of a distinction going to sustain them; and, with respect to the rest, I can see no ground upon which it does not appear to me your Lordships are bound to say that they are all good, or all bad. I have felt desirous to know upon what ground some of the Judges appear to have thought at one time one half of them were good. I cannot take them with reference to the proper interest which they give, or propose to give to the person who claims under them. Can I take them numeri-

cally? Can I say No. 1. is good, and No. 2. bad? No. 10. good, and No. 11. bad? I cannot make a distinction consistently with the principle of decision, which goes virtually to the heart's blood of the whole, and proceeds upon an objection which is either good for every thing, or good for nothing. It is for these grounds, I repeat, that I cannot extricate myself from that situation; and I neither can support these feus in whole nor in part."

1813.
—
KER
v.
DUKE OF
ROXBURGHE,
&c.

It was ordered and adjudged, That the deeds and instru- Journals of
ments challenged by the action of reduction cannot be the House of
considered as proper feus, made according to the true Lords.
meaning and construction, or in the due exercise of the
powers of feuing parts and portions of the entailed
estates, reserved to the heirs of tailzie by the several
deeds under which William, late Duke of Roxburghe,
held the said estates, or as made, or intended to be made,
with any view to the rational and fit management of
the said estates: And it is hereby declared, That the
whole of the deeds and instruments are so connected
together that none of them can be separately sustained
in whole or in part. And it is hereby further declared,
That, having regard to all the circumstances of this
case, and to all the deeds and instruments appearing in
this cause to have been executed, the deeds and instru-
ments challenged are to be considered as alienations, or
making parts of alienations, of portions of the estates, to
operate only after the death of the Duke, to the pre-
judice of the subsequent heirs of entail, and altering
the order and right of succession under colour of creat-
ing feu-rights; and therefore, and it not being neces-
sary, in this case, to consider the several reasons of ob-
jection to the validity of the said challenged deeds and
instruments expressed in the several findings of any of
the interlocutors complained of, further than as they
correspond with the foresaid declarations, it is ordered
and adjudged, That the said interlocutors complained
of in the said appeal, so far as they generally reduce
the several deeds and instruments challenged, be, and
the same are hereby affirmed; and it is further ordered
and adjudged, That the said appeal be, and the same
is hereby dismissed this House.

For the Appellant, *John Clerk, James Moncreiff.*

For the Respondents, *A. Colquhoun, A. Maconochie.*

NOTE.—Neither the Lord Chancellor's speech, as revised by his Lordship, nor the special judgment of the House of Lords, is given in Dow's Report of this case.



INDEX OF MATTERS

IN

VOLUME V.

- ABSOLUTE** or Redeemable. — Vide Disposition, (1 and 2.)
- ACQUIESCENCE.**—Vide Property, (1.)
— Vide Bill, (1.)
- ACT 1695, c. 24.** Apparent heirs passing over their predecessor and serving heir to a more remote ancestor.—Vide Entail, (3.)
- 1696, c. 5. As to rights granted in security.
- 1696, c. 25. In regard to rights granted in trust.—Vide Trust, (3.)
- ACTION** of Approbation.—Vide Teinds.
- ADMISSIBILITY** of Witnesses. — Vide Instrumentary Witnesses.
- AGENT** of Bank.—Vide Bank Agent.
- AGREEMENT.**—Held that a letter written by the respondent's attorney, did not, in its import, infer a binding agreement to grant a personal protection—the conditions with which it was made not having been complied with on the other part.—Allan v. De Voz, and Ramsay, Williamson and Co. his Attorneys, 24th March 1806, p. 110.
- ALIEN.**—Vide Foreign et Marriage.
- APPARENT** Heirs.—Vide Entail, (3), and Passive Titles.
- Heirs of entail in possession, though not infest, can grant a liferent to their widows, binding under the act 1695, c. 24, against an heir of entail passing by and serving to a more remote predecessor. — Graham v. Countess of Glencairn, 7th July 1806, p. 134.
- APPROBATION**, Action of.—Vide Teinds.
- APPROBATE** and Reprobate. — Vide Deathbed.
- ASSIGNATION** Intimated.—Vide Trust (Latent) (3.)
- ASSIGNEES** and Subtenants. — Vide Lease (1.)
- ASSYTHMENT.**—Vide Damages (3.)
- AUGMENTATION** of Stipend. — Vide Stipend.
- Do. do. do.
- BANKRUPTCY.**—(1.) The trustees and commissioners on a bankrupt company estate, the chief assets of which consisted of a valuable lease of coal, entered into the possession of the lease, and wrought the coal for behoof of the creditors. In doing this they wrought the coal in such a manner as to do great damage to the value of the coal and surface above. In an action of damages against them, they stated that the action was irrelevant against a trustee, and commissioners appointed by act of parliament to manage the bankrupt estate to the best of their judgment : Held the action irrelevant. In the House of Lords case remitted, with strong doubts expressed as to the correctness of the judgment.—Wilson, &c. v. Alexander, &c., 12th Aug. 1807, p. 182.
- (2.) A petition and complaint was presented to the Court for removal of a trustee, on the ground of gross mismanagement of the estate, and for the removal of the three commissioners, on the ground of personal objection as to one of them, and as to the other two, that they resided in Edinburgh, while

the trustee and the bankrupts, and bankrupt estate, were resident in Greenock : Held, 1. That no sufficient evidence had as yet been adduced to authorize the removal of the trustee, or Mr. Learmonth, one of the commissioners. 2. But that the two other commissioners were not duly chosen, in respect they did not reside in Greenock, where the business was chiefly conducted, and where the trustee himself resided. The first question was alone appealed to the House of Lords, and the case remitted for reconsideration, with considerable doubts expressed as to the judgment of the Court of Session, and special directions as to the points to be reviewed. — Campbell and Co. v. M'Nair, 11th July 1805, p. 48.

BANK AGENT.—Deposit Receipt.—(1.) Messrs. Smith and Son were agents in Brechin for the Bank of Scotland. It turned out that they also carried on business as bankers on their own private account. A deposit of money was lodged with them, and a deposit receipt obtained, signed by them, not as agents for the bank, but in their own private name ; Held, on their failure, that the principal bank for which they acted as agents was liable for payment. Reversed in the House of Lords. — Bank of Scotland v. Watson, 26th March 1813, p. 655.

BILL.—(1.) Circumstances in which it was held that a bill granted by a party for £500, and which bore by relative letter, to be discounted for his accommodation, was not due as a debt against that party, it appearing that he had expended the £500 in serving the appellant's political interests and those of his family, this being supported by acquiescence, no claim having been made upon the bill for six years after it fell due, and after the death of that party.—Earl of Wemyss v. Alexander Carre, Esq., 24th May 1808, p. 219.

—(2.) (Accommodation). — Circumstances in which the allegation

that part of the debt in the bond was for accommodation bills granted for the benefit of other parties was disregarded. — Sir Wm. Johnstone of Hilton v. Noel. Templar and Co., and Others, 12th Dec. 1812, p. 653.

BURGH Election. — Circumstances in which it was held, that as there was not a majority of councillors present to constitute a legal meeting of council, an objection stated to the legality of the meeting on that ground, was sustained. Affirmed in the House of Lords.—Masterton and Others, Councillors of the Burgh of Culross v. Meiklejohn and Others, Bailie and Councillors of the said burgh of Culross, 22d March 1810, p. 298.

BURGH Customs. — Vide Custom or Town Dues.

CAUTIONER (Relief). — The cautioner for a bank agent applied to others to relieve him of that obligation. They did so ; and when called on to pay under this bond of relief, their defence was, that at a time when the cautioner knew his nephew's affairs were getting involved, and that he was likely to suffer loss, he had applied to them to relieve him of that obligation, and that they had been induced by fraud, concealment, and misrepresentation, in regard to the nephew's affairs, to do so, and therefore were not liable. The Court of Session held they had failed to state relevant facts to infer that the respondent had been guilty of fraud. Affirmed in the House of Lords.—Webster, &c. v. Christie, 28th May 1813, p. 705.

CASTING Vote at an election of Professor.—Vide College (2).

CAUTION De Judio Sisti.—Held that a suspension and charge of a decree *in foro contradictorio* of the Court of Session, could only be obtained on consignation or caution ; but execution sisted upon condition of the defender finding caution *de judio sisti*. —Allan v. De Voz, 24th March 1806, p. 110.

CLAUSE of Destination.—Vide Entail, (1).

— as to Feuing.—Vide Lease.

COLLEGE (1.) An election of a professor having taken place in St. Andrews College, and Dr. James and Dr. John Flint having been elected as joint Chandos professors of medicine in the university of St Andrews, this was objected to as irregularly proceeded with, and as inconsistent with the terms of the foundation, and with the practice in that university of electing professors. It was answered, that in practice it was quite common in the other universities of Aberdeen and Glasgow to make a joint election, and the practice was followed in the church of Scotland of appointing an assistant and successor, which this appointment simply was: Held that the election was a good election. In the House of Lords this was reversed; and held that a joint election was not permitted by the foundation, and therefore illegal and void.—Dr. Robert Arnott v. Dr. George Hill, 26th May 1809, p. 256.

— (2.) In the election of a professor for the chair of Natural Philosophy, in the Colleges of St. Salvator and St. Leonard, of St. Andrews, two candidates appeared, and were put in nomination. Four Professors voted for Mr. Jackson, among whom was the Principal of the College; and four voted for Mr. Macdonald, the other candidate. Whether the one or the other was elected depended upon, Whether the Principal had both an original vote, and also a casting vote, or only a casting vote, in case of equality? and whether the vote given by Dr. Flint was a valid vote, he not having been duly admitted as a Professor? Held that the Principal was not entitled to give two votes, but only a casting vote in case of equality, and that Mr. Macdonald was duly elected Professor to the chair. Reversed in the House of Lords, and held that the Principal was entitled

both to an original and a casting vote in the case of equality, and therefore that Mr. Jackson had been duly elected Professor.—Dr. Playfair and Others v. Rev. Mr. Macdonald and Others, 26th May 1809, p. 266.

COMMON.—Vide Property, (5.)

COMPENSATION.—Vide Sale, (6.)

— Vide Partnership.

COMPETITION of Brieves.—Vide Entail, (4.)

CONCEALMENT.—Vide Insurance, (1.)

— Vide Insurance, (2.)

— Vide Insurance, (4.)

CONJUNCT and Confident.—Vide Bankruptcy, (2.)

CONTRACT of Sale.—Non-Fulfilment —Action was raised for delivery of four puncheons of spirits, or for damages for non-fulfilment of the contract. The spirits were purchased in the knowledge, on the buyer's part, that there was to be a rise in the price, and he bought at the old price. The seller was ignorant of this intended rise in the price, and of this information from London which the buyer possessed. The seller afterwards refused to deliver: Held him liable in £200 damages, being the sum concluded for, estimated according to the highest price of whisky that could be got at the time of pronouncing decree.—Boswell v. Morrison, 20th July 1812, p. 649.

— Circumstances in which it was established by letters, &c. that the appellant had come under an obligation to procure the respondent a commission in the army, and having failed to do so, was liable in a sum equal to procure an ensign's commission at the time.—Macdonald v. Elder, 24th July 1811, p. 542.

CONSTRUCTION of Deeds.—Rules of Ditto.—Vide Entail, (4), (5), et seq.

CONSTRUCTIVE or Actual Delivery.—Vide Stopping in Transitu.

CONVEYANCE in Security.—Vide Disposition in Security, (1.)

COPARTNERY.—Vide Partnership.

COPYRIGHT.—Vide Literary Property.

CRUIVE Fishing.—Circumstances in

which the Court of Session were held entitled, under the remit of the House of Lords, to regulate the construction of the cruive dykes, and boxes; and the construction and position of the inscales, as well as the spars and hecks used in such fishing. Affirmed in the House of Lords, with the exception as to the cruive boxes, which was remitted for reconsideration.—*Johnstone and Others v. Stotts, &c.*, 2d May 1806, p. 119.

CRUIVE Dyke.—Vide *Dam Dyke*.

CUSTOM.—The Magistrates of Aberdeen were in the practice of exacting a duty in their city weigh-house, on all tallow, butter, and cheese, brought into their market. The question was, Whether this regulation, in reference to tallow, included refined tallow, as well as tallow in the rough, and was to be exacted from freemen? Held, in the Court of Session, that it referred to tallow refined as well as unrefined, and to freemen as well as unfreemen. In the House of Lords, remitted for reconsideration, with special findings.—*Still and Others v. Magistrates of Aberdeen*, 16th June 1810, p. 313.

DAM Dyke.—The proprietors of mills had, in process of time, altered their check dyke, so as to prove injurious to the salmon-fishing of the superior heritors. Circumstances in which it was held that this dyke must be built and restored to its original state, at the expense of the proprietors of these mills. Affirmed in the House of Lords.—*Scott, &c. v. Gillies, &c.*, 20th July 1813, p. 750.

DAMAGES in Working Coal. (1.)—Vide *Bankruptcy*, (2.)

(2.)—A party had acquired right to an estate in which there was a pit not then in use, (and which had remained so uncovered and unfenced for many years previous to his purchase), situated at the side of a public road. A passenger, on horseback, having on a dark night

deviated from the path, and fallen into the pit, the question was, Whether in law there lay any relevant claim of damages against the appellant as owner of the land in which this pit was, and whether he was to blame in not fencing the pit. Held him liable in £800 of damages. Affirmed in the House of Lords.—*Cadell v. Blacks*, 20th Feb. 1812, p. 567.

Same Case.—In awarding this sum of damages, the Court ordered the amount to be distributed among the whole children of the deceased, giving to each child who was at the date of the decease under fourteen years of age double the share of that child who was then above that age.—*Cadell v. Blacks*, 20th Feb. 1812, p. 567.

— (3.) for Molestation.—Circumstances in which damages were given for molestation.—Vide *Property*, (2.)

— (4.) for Nonfulfilment of Contract in regard to a sale of spirits.—Vide *Contract of Sale*.

— (5.) for Injury done by the landlord to the subject of the lease.—Vide *Retention of Rent*.

DEATH-BED.—(1.) Circumstances in which the heir-at-law was held not excluded from challenging a deed executed on death-bed, although she was excluded by a prior *liege poustie* deed, executed in favour of a stranger, reversing the judgment of the Court of Session.—*Crauford, &c. v. Coutts*, 6th August 1803, and 14th March 1806, p. 73.

(2.) A deed was challenged, on the ground of death-bed and incapacity, by a party not the heir-at-law, but by one to whom the same subject had been disposed by a previous deed. Held him entitled to challenge on death-bed.—*Howie v. Merry*, 17th March 1806, p. 101.

(3.) A trust-deed was executed by John Duke of Roxburghe in *liege poustie*, conveying his heritable and moveable estate to trustees at his death, for these pur-

- poses:—1st, To pay his debts. 2d, To pay annuities and legacies; and, 3d, To settle the residue on such person or persons as he had, or should afterwards appoint, by deed executed by him at any time during his life. He executed on death-bed this deed of instructions to his trustees, and this deed, in so far as it affected the heritable estate, was sought to be reduced on death-bed. Held that, by the trust-deed, the Duke had not divested himself of the heritable estate—that the heir-at-law's right still existed until the moment of the Duke's death, and that the deed executed by the Duke on death-bed was reducible in so far as his unentailed estate was concerned, leaving it and the trust-deed to have effect as to the moveable estate.—*Wauchope, &c. v. Ker, &c.*, 21st Feb. 1812, p. 559.
- DEATH-BED.—(4.) A disposition was sought to be reduced on the head of death-bed, to which it was answered, that the heir-at-law was excluded by a previous deed executed in *liege pousie*—namely, a minute of sale, which sold to the defender these lands; and that the subsequent deed was only in implement of that transaction. Held, that as the subsequent deed was in its nature a new transaction, the previous sale must have been departed from and abandoned by both parties, and held by them as an incomplete transaction; and, therefore, the law of death-bed applied.—*Ranken v. Campbell*, 24th Feb. 1812, p. 573.
- DECREE *in foro contradictorio* of the Court of Session.—Held that a suspension of a charge on such a decree could only be on consignation or caution.—*Allan v. De Voz, &c.* 24th March 1806, p. 110.
- DEED. — (1.) In a reduction of deeds, on the ground of incapacity, Held that the granter was of sound disposing mind at the time he executed the settlement challenged.—*Frank v. Frank*, 10th June 1809, p. 278.
- DEED.—(2.) Vide Insanity.
- (3.) A deed, in order to get over the objection of death bed, had been vitiated and altered in its date, and a proof being allowed, held that the deed challenged being vitiated, and its date false, was null and void.—*Howie v. Merry*, 17th March 1806, p. 101.
- (4.) Circumstances in which a deed, executed by the late Duke of Roxburghe, sought to be reduced on the head of incapacity, was sustained, and the reduction dismissed *quoad* the moveable succession.—*Lady Essex and Lady Mary Ker v. Wauchope and Others*, 17th Feb. 1812, p. 547.
- DELIVERY, Actual or Constructive.—Vide *Stopping in Transitu et Sale*.
- DERELICTION.—Vide *Servitude*.
- DISCHARGE.—Vide *Factor*.—*Remuneration*.
- A daughter raised an action against her brother intronitting with her deceased father's personal estate, for her third share of the executry due her as at his death. The brother refused payment, and claimed to retain her share for large advances, and other sums made to her husband during the father's life. Circumstances in which it was held, that her deceased father having entered into a transaction and agreement with her husband, had discharged all these claims for advances, and that she was entitled to her third share of the executry.—*Rae v. Newal or Rae, &c.*, 2d July 1806, p. 127.
- DISPOSITION in Security.—(1.) Cautioners for a collector of taxes had, on becoming security, procured from him an absolute and irredeemable conveyance of his heritable estate, upon which they were infeft. It was admitted by them that they had never entered into possession, and that, in fact, they held the conveyance as a security only for any loss they might incur for the collector's intromissions. On his bankruptcy, his trustee

brought a reduction of this conveyance, as granted in security of future debt, and therefore void under the statute 1696, c. 5. Held the conveyance good and not reducible under the act, it being *ex facie* an absolute and irredeemable disposition. —*Fordyce v. Gordon, &c.*, 26th March 1807, p. 165.

DISPOSITION in Security.—(2.) A disposition of lands *ex facie* absolute and irredeemable, was granted to a party without any back bond. The granter of the conveyance, for many years thereafter, continued to act in all respects as proprietor with reference to the lands, in lifting rents, granting receipts for these rents, and granting leases of the lands; and he contended by these proofs—of writings, of acknowledgments, and admissions of the grantee, sufficient evidence was adduced to show that the grantee was a mere trustee or incumbrancer. Held that the disposition was absolute and irredeemable, and that he could not redeem or claim the lands. —*Douglas, &c. v. Wilson*, 8th May 1810, p. 303.

DOMICILE.—*Vide* Heritable Debt et Foreign.

ELECTION of Freemen or Burgesses.—Circumstances in which it was held that such election must take place at a meeting of the town-council legally called, and held for that purpose.—*Martin and Others of the Burgh of Queensferry v. M'Nab and Others*, 1st July 1806, p. 125.

———— of Professor in the College of St. Andrews.—*Vide* College.

———— of Magistrates and Councillors.—Circumstances in which it was held, that as there was not a majority of councillors present to constitute a legal meeting of council, an objection stated to the legality of the meeting, on that ground, was sustained.—*Masterton and Others, Bailies and Councillors of the Burgh of Culross, v. Meiklejohn, merchant-bailie, and Others, councillors of*

the said Burgh, 22d March 1810, p. 298.

ELECTION in Partnership, according to the Law of England.—A firm in Greenock carried on business under the social name of Hugh Mathie and Co. Fleming, the appellant, was not a partner in that concern, and had nothing to do with it. But he was concerned in a foreign trade, of which he, Howie, (who conducted that trade abroad), and Hugh Mathie and Co. were partners. Hugh Mathie and Co. conducted the foreign trade in Greenock, and Fleming in London. Hugh Mathie and Co. became bankrupt, with many bills discounted with the respondent's bank. The question was, Whether Fleming was liable, as a partner, for bills discounted in the name of Hugh Mathie and Co., and for behoof of that concern. In the Court of Session, he was held liable, upon the principle that his connection with them in the foreign adventure was such as may have led to the belief that he was a partner. In the House of Lords, the case was affirmed by applying the doctrine of election, on these principles, that where several partnerships, consisting of different individuals, carry on business under the same social name, and enter into negotiable securities under the same signature, the holder of such has a right to select which of these partnerships he chooses for his debtors; but he was not entitled to take *all* the partnerships bound to him as his debtors.—*Fleming v. M'Nair*, 16th July 1812, p. 632.

ENTAIL.—(1.) Held that a deed of entail, granted by Sir Thomas Kennedy of Cassillis in 1748, was alterable, and that Thomas Earl of Cassillis had validly done so.—*Blane, &c. v. Earl of Cassillis and Others*, 24th May 1805, p. 1.

———— (2.) *Obligation to.*—In executing a settlement, in the form of an entail, a certain portion of a lady's estate was directed to be sold

and, after paying debts and legacies, the surplus was ordered to be laid out in the purchase of other parts of the land to be entailed. The disponees under this deed uplifted the funds, a great proportion of which consisted of heritable debts and houses, but the money was never applied in the purchase of land as directed. The forty years prescription elapsed. In an action brought to have the money applied in terms of the obligation to entail, Held, that prescription of forty years had extinguished the obligation, except as to part of the heritable estate, to which a title had been made up within the forty years, and the debts of which it was composed received. —Vide Prescription.—*Rochied v. Sir Alexander Kinloch, Bart. and Others*, 28th May 1805, p. 35.

ENTAIL.—(3.) An entail permitted the heirs of entail to grant liferent infeftments to their wives, provided they did not exceed the fourth part of the rental, and the same were free of former liferents. An heir exercised this power in favour of his wife, and died without issue, and without having made up a feudal title to the entailed estates. The next heir passed by him, and served heir to a more remote predecessor. Held the deceased's lady entitled to her locality lands; and that he was liable under the act 1695, c. 24; regarding the passive titles, and that the provisions of that act applied to apparent heirs taking tailzied estate, as well as those taking a fee simple estate. —*Cunninghame Graham v. Countess of Glencairn, &c.*—7th July 1806, p. 134.

—(4.) Destination. The maker of an entail, after a series of substitutions, conveyed his estates and dignities “to the eldest daughter of the said umquhil Hary Lord Ker, *with- out division, and their heirs-male.*” Lord Hary Ker had four daughters; and, in a competition of briefes, Held, (1.) That the expression, “eldest daughter,” was not, accord-

ing to the construction of this deed, to be confined to the eldest born daughter, but to be construed as applicable to any of the four daughters of Lord Hary Ker, whichever of them might be the eldest at the time the succession opened, the whole four being, by the conception of the deed, called successive and *seriatim*. (2.) There was a prior deed of nomination (1644) which was not revoked by the later deed of (1648). In it the destination was taken to the four daughters by *name*, and the *heirs male of their bodies*; but in the latter deed (1648) the destination was conceived to “*their heirs-male.*” Held, that by the conception of this latter deed, the clause, “*their heirs-male*” was to be construed as calling the *heir-male of the body* of any of the four daughters, whichever of them was the eldest daughter at the time, in preference to the heir-male in general or collateral heir-male; and that it was competent to refer to the previous deed, not for the purpose of construing the deed 1648, or the maker's intention thereby, but to collect from the phraseology and language of these instruments what was the meaning of the language used in the last deed.—Vide Prescription.—*Bellenden Ker, &c.*, and *General Ker v. Sir James Norcliffe Innes, Bart, &c.* 15th, 16th, and 19th June 1809; and 20th June 1810, p. 320.

ENTAIL.—(5.) Reduction.—A reduction was brought of deeds executed on the ground that they were an alteration of the order of succession contained in the entail of the estates, &c. There were two clauses of destination in the entail, by which different classes of heirs were called. After the *first* clause of destination there followed the prohibitory, irritant, and resolute clauses, which were made to apply to the heirs in that clause, by the terms “before and above mentioned.” It was thence contended that the prohibi-

tion against altering the order of succession was made only to apply to the heirs of tailzie called by the first clause of destination, but not to those called by the second clause of destination; and, therefore, that the last Duke of Roxburghe, who succeeded under the latter clause, was not bound by the prohibitions. Held that the second clause of destination was to be viewed as a continuation of the first, and that the prohibitory clause, against altering the order of succession must be held to apply to the whole heirs of tailzie, and the heirs in the second clause to be viewed as heirs of tailzie, to whom these prohibitions applied. (2.) It was farther contended that the prohibitory clause, if it did apply, was not in itself sufficient to prohibit the alteration of the order of succession, conceived in these words: "Nor to do any other thing to the hurt and prejudice of thir presents, and of the foressaid tailzie and succession, in hail or in part." Held, these words were sufficient to protect the alteration of the order of succession as in a question between heirs. (3.) A defence was stated to the reduction, setting forth, that as Duke William was the *last heir* of the tailzied destination, he did not hold the estates fettered with limitations in favour of any other heir, (Lady Jane's descendants having terminated with him, and the destination to the "eldest daughter" being confined to her alone), but that he held a fee simple estate, and was entitled to make the entail and trust-deed in favour of the appellants. Defence repelled.—Bellenden Ker, &c. v. Sir James Norcliffe Innes and General Ker, 15th, 16th, and 19th June 1809; 20th June 1810, and 8th June 1811, p. 361.—Vide Feu Cause for another branch of this case.

ENTAIL.—(6.) The question in the Culdares entail was, Whether the party first called in the entail was an institute, or an heir of tailzie? In the

first part of the entail, (nomination of the heirs of tailzie), he was called expressly as an heir of tailzie, but in the latter part of the deed of disposition he was called as an institute or fiar. Held him not subject to the fetters of the entail. Affirmed in the House of Lords.—Menzies v. Beresford, or Menzies, &c., 21st July 1811, p. 522.

ENTAIL (7.) Destination.—An entail, after calling certain substitutes, called, failing them, "the eldest daughter of the said Lord Hary Ker, without division, and yr aires male." Lord Hary Ker had four daughters, and it was held, both in the Court of Session and House of Lords, that this destination was not to be confined to the eldest born daughter, but applicable to the whole four daughters, whichever of them might be the eldest at the time the succession opened. Lady Essex Ker, who was a female descendant of the body of Lady Jane Ker and Sir William Drummond, did not dispute this; but she stated that the term *eldest daughter* was capable of a more extended meaning, and to mean, in the technical language then in use, an "heir female" however remote, under which category she was entitled to succeed, as the eldest heir female of Hary Lord Ker for the time being. The Court held her claim inadmissible. Affirmed in the House of Lords.—Lady Essex Ker v. Sir James Norcliffe Innes, Bart., General Ker, and Bellenden Ker, 26th Feb. 1812, p. 579.

—(8.) The Roxburghe entail contained strict prohibitory clauses against alienation, contracting of debt, or doing any deed whereby the estate might be adjudged, or doing any other thing to the hurt and prejudice of the said tailzie and succession; but "reserving always liberty to the said heirs of tailzie to grant teus, tacks, and rentals of such parts and portions of the said estate and living as they shall think fitting, providing the same be not

"granted in hurt and diminution of the rental." An heir of entail having granted sixteen separate feus of the whole estate: Held, in a reduction of these feus, that this was not a proper exercise of the reserved powers in the entail. In the House of Lords, case remitted for reconsideration, and with special directions.—*Bellenden Ker v. Sir James Innes Ker, Bart., &c.*, 6th July 1812, p. 609.—*Vide Infra*, (10.)

ENTAIL—(9.) In the entail of Neidpath there were clauses prohibiting the heirs of entail to "sell, alienate, wadset, and dispone any of the said lands,"—but allowing tacks to be made of the lands for the lifetime of the heir, "the same always being set without evident diminution of the rental." The late Duke of Queensberry granted a lease of Wakefield for ninety-seven years, at a rent of £86. 15s. 2d., receiving at same time from the tenant a grassum of £318. The question was, Whether this long lease was not an alienation of the lands? Held that it was an alienation. Affirmed in the House of Lords.—*Duke of Queensberry's Executors v. Earl of Wemyss and March*, 10th Dec. 1813, p. 758.

—(10.) In the same case as No. 8, *supra*, the question being remitted to the Court of Session, that Court adhered to their former interlocutor, setting aside these feus on special grounds set forth by them. The House of Lords affirmed this judgment on these grounds,—that they could not be considered as proper feus made according to the true meaning of the entail, or in the due exercise of the powers therein, nor made with any view to the rational management of the estates; and that the whole deeds and instruments sought to be reduced, when considered as a whole, were to be taken as alienations and as alterations of the order of succession, under the colour of creating feus.—*Bellenden Ker v. Duke of Roxburghe*, 18th Dec. 1813, p. 768.

ERROR in Fact and Law.—Circumstances in which the cautioner in a bond, was held entitled to relief against one, who came under an obligation to relieve him after the expiry of the septennial limitation; and this, though the obligation was granted in ignorance of the fact and law, that the bond was gone as a valid bond against the cautioner, in respect of the septennial limitation.—*Henderson v. Ramsay and Others*, 22d July 1806, p. 155.

EVIDENCE.—*Vide Proof*—*Parole et Witnesses*.

EXECUTRY.—A daughter raised an action against her brother, who intermitted with her deceased father's personal estate, for her third share of the executry due her as at his death. The brother refused payment, and claimed to retain her share for large advances and other sums made to her husband during the father's lifetime. Circumstances in which it was held, that her deceased father having entered into a transaction and agreement with her husband, had discharged all these claims for advances, and that she was entitled to her third share of the executry.—*Rae v. Rae or Newal*, 2d July 1806, p. 127.

EXECUTION of Deed.—*Vide Witnesses et Solemnities*.—Held (1.) that a deed fell to be sustained as regularly executed, although one of the witnesses *ex intervallo* deponed that he did not see the granter subscribe, nor hear him acknowledge his subscription. (2.) That the act, or the practice under the act, in regard to the execution of deeds, did not require that the witnesses should adhibit their subscriptions in the same room with, and in the presence of the granter.—*Frank v. Franks*, 10th June 1809, p. 278.

FACTOR — (Remuneration.)—A factor received a fixed salary named in his factory. He continued for thirty years to act; and, on the duties being increased, the Earl converted the sa-

lary into a bond of annuity for life. During this whole period of his service, annual accounts were given in, including his salary of £100, and discharges mutually granted, without any other claim being made. In a claim made by him for remuneration for services unconnected with his factory,—Held that he could not legally claim such remuneration.—*Rose v. Earl of Fife*, 25th April 1806, p. 115.

FEU and Liferent.—A destination in a settlement was conceived “to Thomas Thomson, my son, *in life-rent*, for his liferent *use alienarly*, and to heirs whomsoever of his body; whom failing him and his heirs, to the said Catherine and Elizabeth Thomson, my daughters, in liferent, for their liferent use only; and to their children equally among them in fee.” Held the fee to be in the daughters’ children, and a liferent only in Thomas Thomson.—*Thomson v. Thomson*, 14th Dec. 1812, p. 654.

FEU-Right.—*Vide Lease.*

FEUING, Powers of.—*Vide Entail*, (8.)

FICTITIOUS Vote.—*Vide Freehold Qualification.*

FISHING.—*Vide Cruive Fishing.*

—*Vide Dam Dyke.*

FOREIGN.—(1.) Held that a person born an alien of a father originally a native of Scotland, and who had emigrated to America, but had succeeded to heritable estate in Scotland, could not plead the subsequent marriage of his parents as a legitimization of the previously born children, in order to permit him to succeed to that estate in Scotland.—*Shedden, &c. v. Patrick*, 3d March 1808, p. 194.

—(2.) An heritable bond was granted over a deceased testator’s estate in Scotland. He had died domiciled in England, after making a will in the English form, leaving the heritable estate to the heir-at-law, and his moveable estate to executors, under a burden of paying “all my lawful debts.” Held this clause insufficient to exempt the heir-at-

law taking the heritable estate from payment of the debt with which it was burdened; and also held that though the deceased died domiciled in England, and heritable bonds were a burden there on those taking the executry, yet that, in taking the heritable estate in Scotland, he must take it subject to its burdens, and according to the law applicable to heritable estate in Scotland.—*Frazer v. Spalding, &c.*, 20th July 1812, p. 642.

FREEHOLD Qualification.—Objections were stated to the claim of a party claiming to be enrolled as a voter. The Court of Session sustained the objections without taking or ordering any proof as to the fictitious nature of the claim. In the House of Lords the case was remitted with liberty to receive such evidence.—*The Hon. Charles Fleming v. G. H. Drummond and Others*, 23d July 1811, p. 537.

FRAUD.—One of the grounds of reduction for setting aside a deed was fraud; circumstances in which this ground of reduction was not made out.—*Frank v. Frank*, 10th June 1809, p. 278.

GLEBE.—*Vide Manse and Glebe.*

HABIT and Repute.—*Vide Propinquity.*

HÆRES Masculus et Lineæ.—In a service under such a character, what does it denote and comprehend?—*Vide Service*, (1.) and (2.)

HEIRS.—Relief among Them.—*Vide Heritable Debt.*

HEIR of Tailzie.—*Vide Entail*, (6.)

—*Apparent.*—An apparent heir of entail possessed the entailed estate for many years, without completing his feudal title. The entail permitted the heirs of tailzie to grant liferent infeftments to their wives, not to exceed a fourth of the rent of the said lands, and provided the same were free from former liferents. He granted a liferent locality to his wife, and, after his death, it was objected that the estate could

not be affected by the debts or deeds of the heir in possession unless he was feudally infeft,—that the statute 1695 did not infringe on this rule—that apparent heirs of tailzie could not so burden the estate,—that the statute 1695 did not apply to them or to tailzied estate, but only to fee simple estate: Held him bound to grant a disposition of the locality lands to the Countess.—*Graham v. Countess of Glencairn, &c.*, 7th July 1806, p. 134.

HEIR Male.—Held that, by the conception of the Roxburghe deed of entail, the terms “their heirs male” were to be construed as heirs male of the body.—*General Ker and Bellenden Ker v. Sir James Norcliffe Innes*, 20th June 1810, p. 320.

— of Line.—*Vide* Prescription et Service.

— Female.—In the Roxburghe entail, Lady Essex Ker contended that the terms “eldest daughter” used in the entail, meant, according to the technical language used at the time the entail was made, an “heir female” however remote; and under this description she, as eldest heir female of Harry Lord Ker, and a descendant of the body of Lady Jane Ker and Sir William Drummond, was entitled to succeed to the Roxburghe estates and dignities. The Court and House of Lords repelled this claim.—26th February 1812, p. 579.

— Whatsoever. — Mr. Bellenden Ker, a competitor for the Roxburghe estates and dignities, stated that as Duke William was the *last heir* of the tailzied destination, he did not hold the estates fettered with limitations in favour of any other heir, (Lady Jane’s descendants having terminated with him, and the destination to the eldest daughter being confined to her alone), but that he held a fee simple estate, and was entitled to make the new entail and trust deed in favour of the appellants. This plea was repelled.—*Ker v. Sir James Norcliffe Innes*, 8th June 1811, p. 362.

HERITABLE or Moveable.—In computing the legitim, of a daughter, her deceased father’s estate consisted of his interest in a copartnery concern, carried on by him and his son. A great proportion of the company property consisted of heritable estate, such as a dock and a ropery work, both of which, it was alleged, was connected with their business of ship builders. There were other houses not so connected with the business. The copartnery was dissolved by the death of the father; and the question was, Whether the heritable estate, and what part of it, could be viewed as moveable estate, so as to entitle the daughter to include it within the claim of her legitim? The Court of Session held it to be moveable, and subject to her legitim. In the House of Lords this part of the case remitted for reconsideration, Lord Eldon expressing doubts about it; and stating that he would have decided the question according to the law of England, had the decisions in that country been uniform on the point.—*Kirkpatrick (formerly Balfour) v. Sime*, 22d July 1811, p. 525.

— Debt.—The heir to the heritable estate, on which there was a burden of £2000, contended that as by the deceased’s will the executor was taken bound “to pay all my “just and lawful debts,” that he had a right to be relieved by the executor of this heritable debt, which was the only debt owing by the deceased. Held him not entitled to such relief, and that he must take the heritable estate with all its burdens, unless the deceased had expressly exempted him from these, which, in this case, had not been done.—*Frazer v. Spalding, &c.*, 20th July 1812, p. 642.

— Security.—*Vide* Disposition, (I.)

HOMOLOGATION.—A daughter claimed her legitim twenty-one years after her father’s death. By his settlement she was left an annuity of £50 per annum; which was never paid

PAROLE.—(1.) Observed that the want of the date of a deed which had been vitiated, could not be supplied by parole, and still less the vitiation of a date.—*Howey v. Merry*, 17th March 1806, p. 101.

— (2.) In a judicial sale of land by lots, the articles of roup gave a different description of the boundaries from what was contained in the plan prepared for the sale, and which marked out the boundaries. It was stated that the judicial proceedings in the sale specially referred to the plans of the estate. Parole proof was allowed, in which the surveyors were examined, though it was contended that the description of the boundaries, as contained in the articles of roup, could not be affected by those plans and such proof.—*Glassel v. Earl of Wemyss*, 22d March 1806, p. 104.

— (3.) In cases of propinquity, parole testimony of general report, and habit and repute allowed.—*Richan v. Trail, &c.*, 1st July 1808, p. 239.

— (4.) Vide Witness.

— (5.) Circumstances in which a trust was allowed to be proved by facts and circumstances, and the correspondence of the parties, in regard to a lease granted to the trustee *ex facie* absolute. Affirmed in the House of Lords.—*Gordon, &c. v. Touch*, 13th Feb. 1810, p. 286.

— (6.) It was argued that a marriage, celebrated by the party declaring before witnesses (his own servants) that the female who resided with him, and who was then present, was his wife, and her children his lawful children, and taking them to witness to this declaratory act, was, like a promise of marriage, incapable of being proved by parole alone, without some writing or acknowledged solemnity to support it. Held that parole was competent.—*Vide Proof*.—*M'Adam v. Walker*, 21st May 1813, p. 675.

— (7.) In a claim made for exclu-

sive right to a road, parole evidence was allowed to prove that his predecessor had, along with another party, purchased the ground for the road. Held this parole evidence insufficient against the respondents' possession and use of the road as a part and pertinent of their property.—*Smyth v. Allan, &c.*, 10th May 1813, p. 669.

PARTNERSHIP.—(1.) A father and son were in partnership together as shipbuilders. After the father's death, which dissolved the copartnery, held that certain heritable subjects, though feudally vested in the father's name, as an individual, belonged to the partnership, and as such were to be held as moveable estate in a question of succession, and therefore subject to legitim. In the House of Lords, this point was remitted for reconsideration, with doubts expressed.—*Kirkpatrick (formerly Balfour) v. Sime*, 22d July 1811, p. 525.

— (2.) The partnership of Hugh Mathie and Co. consisted of three individuals, who carried on business in Greenock. They had an interest in a separate adventure or concern with other individuals at Nassau, one of whom was Fleming in Greenock, the other Howie in Nassau. Hugh Mathie and Co. managed the foreign business in Greenock. Hugh Mathie and Co. became bankrupt, with bills due to the Bank of Scotland at Greenock, where Mathie had discounted them. The question was, Whether Fleming was a partner of the company of Hugh Mathie and Co., and liable on these bills? Held him liable for three of them, upon the principle that his connection with them in the foreign adventure was such as led to the belief that he was a partner, and made him liable as such. In the House of Lords the case was affirmed, but by applying the doctrine of election to the case.—*Fleming v. M'Nair*, 16th July 1812, p. 632.

— (3.) In the circumstances

LIFERENT and Fee.—Vide Fee and Liferent.

LITERARY Property.—Actions of interdict and damages were brought by parties in right to the copyright of the Works of Burns the Poet, which, after the publication of Dr. Currie's edition, had been pirated and published by the respondent, a printer and publisher in Edinburgh. The book had not been entered at Stationer's Hall, and the Court of Session held, that the only protection lay in the statutory penalties; and if the book was not entered in Stationer's Hall no action was competent at common law for indemnification or protection. In the House of Lords this judgment was reversed by a special declaration, stating that though the work was not so registered, yet that the parties had, for the term specified in the statute, a right vested in them, entitling them to maintain a suit for damages, and also to interdict in case of the violation of that right. — *Cadell and Davies v. Robertson*, 16th July 1811, p. 493.

LOCATIO Operarum.—Vide Factor.

MAGISTRATES.—Held the Magistrates of Kirkcudbright liable for the escape of a debtor from prison, although they alleged that there was no defect in the prison, no *culpa* on their part, and no carelessness nor want of vigilance on the part of the jailor; and that the escape had been effected only by the most powerful forces having been applied.—*Magistrates of Kirkcudbright v. Affleck*, 20th March 1809, p. 254.

MANSE and Glebe.—Held that a minister of a parish, chiefly situated within the royal burgh of Dunfermline, with a landward part, was entitled to have a manse designed to him, together with a glebe of four acres of arable land, and a grass glebe sufficient to pasture two cows and a horse, and that the sums which a predecessor in the incumbency had

agreed to accept in lieu of these did not shut out this claim.—*Earl of Elgin v. M'Lean*, 9th March 1812, p. 593.

MANSE.—A manse had got into disrepair, and certain proceedings had been instituted before the presbytery, with the view of having it repaired, which was ordered and done accordingly. Thereafter the heritors applied to have the manse declared a free manse. The presbytery declared the "manse and its offices are sufficient." The question was, Whether the manse, under this finding, was declared a free manse, so as to throw the burden of subsequent repairs on the minister during his incumbency. Held that the manse had not been declared a free manse, and that the heritors were liable in further repairs.—*Duke of Hamilton v. Scott*, 14th July 1813, p. 745.

MARRIAGE (Constitution of).—(1.) Circumstances in which a man made a declaration of marriage with a person then living with him, and who had born him two children, and who was pregnant with a third, by declaring before witnesses, called in to witness the ceremony, that he "took them to witness that this is his lawful married wife, and the children by her his lawful children," and this declaration being assented to on the other part, was held as a lawful marriage. (2.) The gentleman having shot himself a few hours thereafter, the plea of insanity was set up against the marriage, but held this was not proved.—Vide Proof.—*M'Adam v. Walker*, 21st May 1813, p. 675.

MENTAL Incapacity.—Vide Reduction.

MINORITY.—Vide Prescription.

MISMANAGEMENT of Bankrupt Estate.—Vide Bankruptcy.

MISREPRESENTATION.—Vide Cautioner.

MORTIFICATION.—Vide Trust Uses.

NAVIGABLE Rivers.—Vide Property (I.)

NEGLECT.—Vide Magistrates.

under the original conveyance. The appellant contended that the investiture having been conceived in favour of heirs of line for the last seventy years, the limited title had been wrought off by the unlimited title by force of prescription, and she had right to succeed as heir portioner along with her sister. Held that there were no *termini habiles* for prescription of the charter 1702, that charter being still extant, and unlimited in its nature, and these retours of service to be construed as conformable thereto, and carrying the original unlimited title; and, therefore, whenever one has two unlimited titles in his person, he is supposed to possess on both.—*Durham v. Durham*, 5th Mar. 1811, p. 482.

PROOF.—In the proof of a marriage, the plea of insanity was stated as incapacitating one of the parties from validly entering into such a contract, and a proof of that insanity was allowed. In the course of taking the proof, the appellant attempted to prove constitutional tendency to insanity in the deceased's family, by offering evidence as to the insanity of his progenitors, but the Court of Session held it incompetent to prove the insanity of M'Adam by such facts. In the House of Lords the Lord Chancellor found it unnecessary to dispose of this point in the case.—*M'Adam v. Walker*, 21st May 1813, p. 675.

PROPERTY on Banks of a Public River.

—(1.) An interdict was brought by the respondent, with a declarator brought by the appellants, to have it declared that the Carron, being a public navigable river, all his Majesty's lieges navigating this river had right to use the banks thereof, as far as necessary for the purpose of navigation, and that, past the memory of man, a tracking path had been used for towing the vessels on both sides of the Carron, and that mooring posts had been placed on these banks to serve the same pur-

pose. The Court of Session, after proof taken, held that there was established a right of towing and tracking vessels on both banks of the Carron, with the exception of a part marked out, belonging to the respondent, as to which there seemed to have been some interruption acquiesced in by the public. In the House of Lords, held that the right of tracking on the north side of the river, where this excepted part lay, was as good as on the south side;—that there was a clear right of tracking on both sides in point of law; but that the acquiescence of the parties (public) may have shut them out from the part excepted. (2.) Held that the appellants were entitled to have mooring posts on this part so excepted, and that they were not liable to bear any part of the expense in keeping up the sea dykes or mooring posts.—*Carron Company v. Ogilvie*, 7th March 1806, p. 61.

PROPERTY —(2) A declarator was raised, together with separate actions of interdict and damages for molestation against the appellants, to have it found that they had no right of property, or right of common or pasturage, or casting fuel, feal, or divot, over the respondents' lands of Alyth and the lands of Drumheads, &c., and to declare the lines of the march which divided these from the appellants' lands of Kilry, and to ordain not to molest them in their possession, and for damages for molestation. The defence was chiefly rested on immemorial possession had by the appellants and their tenants, and no exclusive title by the respondents: Held, though the proof of possession on both sides was contradictory, yet, from the presumptive real evidence arising from the state of the natural marches on hill grounds, the respondents had made out their right, and were entitled to interdict and to damages for molestation.—*Whitson, &c. v. Sir James Ramsay, &c.*, 14th April 1813, p. 664.

—(3.) A party claimed exclu-

sive right to a stripe of ground along a ditch or wall, and also to a piece of moss ground, as part and pertinent of his property. He held a bounding charter, and failed to prove forty years' possession: Held that he had no right.—*Smith v. Allan, &c.*, 10th May 1813, p. 669.

PROPERTY in Church.—(4.) A party of the Seceders Body of Perth conceiving that the other part of their body were departing from their original principles, by altering the formula of their church, respecting the power of the civil magistrate, separated themselves, and claimed the church and session-house as the adhering body of the church. Held that nothing had yet been done to alter the formula by the other party, and therefore that the church remained with them. On appeal to the House of Lords, the case was remitted for reconsideration. — *Craigdallie and Others v. The Rev. J. Aikman*, 16th June 1813, p. 719.

— (5.) Circumstances in which a party claimed a piece of ground near to the burgh of Inverness, as his absolute property. The defenders stated, in defence, that they had held the land as common for the use of the burgh, and possessed it as such, while the pursuer's charter was a bounding charter, which did not entitle him to anything beyond the bounds: Held the defences good; reversed in the House of Lords.—*Duff v. Magistrates of Inverness*, 13th Dec. 1813, p. 762.

PROPINQUITY.—*Vide Service et Succession.*

RECOMPENSE.—(1.) *Vide Factor et Remuneration.*

— (2.) *Damages, (2.)*

RECALL of Sequestration.—*Vide Sequestration.*

REDUCTION of Deeds on ground of Incapacity and Fraud.—Held that the granter of the deed was of sound disposing mind at the time he executed the settlement challenged.—*Frank v. Frank*, 10th June 1809, p. 278.

— (2.) Circumstances in which a deed, executed by the late Duke of Roxburghe, sought to be reduced on the head of incapacity, was sustained, and the reduction dismissed *quoad* the moveable succession. Affirmed in the House of Lords.—*Ladies Ker v. Wauchope, &c.*, 17th Feb. 1812, p. 547.

— (3.) *Ex Capite Lecti.*—*Vide Deathbed (2.)*

— (4.) *Ex Capite Lecti.*—*Vide Deathbed (3.)*

— (5.) *Vide Relevancy.*

— (6.) Circumstances in which a service was reduced.—*Whyte v. Stewart*, 28th Feb. 1806, p. 60.

RELEVANCY.—(1.) A reduction of deeds was brought on the ground of insanity. The granter of the deeds had been insane in 1795, and the deeds challenged were executed in 1798, but there was no specific allegation that the granter, at the dates of these deeds, was insane: Held the facts irrelevant, and too vague to go to proof.—*Thomson, &c. v. Tate, &c.*, 11th July 1807, p. 176.

— (2.) *Vide Bankruptcy (1.) et Damages against Trustee and Commissioners on a Bankrupt estate.*

— (3.) *Damages (2.)*

RELIEF between Heir and Executor.—*Vide Heritable Debt.*

— (2.) Circumstances in which the cautioner in a bond was held entitled to relief against one who had come under an obligation to relieve him after the expiry of the period of the septennial limitation; and this, although the obligation was granted in ignorance of the fact and law, that the bond was gone as a valid bond against the cautioner, in respect of the septennial limitation.—*Henderson v. Ramsay, &c.*, 22d July 1806, p. 155.

REMOVING.—A lease was granted to the tenant and his heirs, secluding assignees and subtenants, for twenty-one years. The tenant died two years thereafter in considerable debt; and the question was, Whether certain transactions gone into with the

heir, by which the latter entered into possession *cum beneficio inventarii*, giving the creditors the benefit thereof, was not a covered assignation, and the tenant had thereby incurred an irritancy of the lease? The heir, pending the action, entered into an agreement with the creditors, whereby the latter discharged their claims, and transferred the stock for a certain sum; Held that there was no ground for removal, and the defenders assolizied. Affirmed in the House of Lords.—Earl of Galloway v. M'Hutcheon and Selkirk and Others, 21st April 1807, p. 169.

REMOVAL of Trustee and Commissioners.—Vide Bankruptcy et Trustee.

REMUNERATION.—Vide Factor.

RES JUDICATA.—(1.) Held, in regard to a mortified or trust fund, for providing a stipend to the minister for the time being of the kirk of Borrowstownness, that a former decree of the Court of Session regulating the appropriation of what was then the whole fund, did not bar a new action by a subsequent incumbent, to prevent the appropriation of that fund to different purposes from those to which it was mortified, and to determine the right to the annual surplus that had since emerged by the increase of the stock.—Rev. Mr Rennie (Minister of Borrowstownness) v. Tod and Others (Inhabitants of Borrowstownness), 21st July 1806, p. 144.

—(2.) Circumstances in which a former decree in regard to the same question (a daughter's legitim) was not held a *res judicata*, the same having been a mere decree by default, for not giving in condescendence.—Millie v. Millie, 18th March 1807, p. 160.

—(3.) In a claim made by the minister of Dunfermline for a manse and glebe, held that the same question and claim having been made by a predecessor in the incumbency, was not a *res judicata* so as to foreclose the present claim.—Earl of Elgin v. Rev. Allan M'Lean, 9th March 1812, p. 593.

REVOCATION of Deed, Express and Implied.—Vide Deathbed (1). Vide Crauford v. Coutts, 14th March 1806, p. 73.

RETENTION.—(1.) Held a brother not entitled to retain from his sister's share of their deceased father's executry, certain advances made by the father during his lifetime to the sister's husband,—it appearing from the statement of the transactions between the father and son-in-law, that those had been discharged.—Rae v. Newal, 2d July 1806, p. 127.

—(2.) In a lease of fishings, the tenant resisted payment of his rent, on the ground of alleged injury done to the fishings by the operations of the landlord, and damages arising therefrom: Held him not entitled to retain rent on account of such alleged damages. In the House of Lords case remitted for consideration, with an opinion that damages were due, and that it fell on the Court of Session to ascertain and fix the damages.—Hall v. Ross, 23d June 1813, p. 728.

REVOCATION.—Vide Death-Bed.

SALE of Land.—(1.) In a judicial sale of land by lots, the articles of roup gave a different description from that contained in the plan prepared for the sale, and which marked out the boundaries. It was stated that the judicial proceedings in the sale specially referred to the plans of the estates. Parole proof was allowed, in which the surveyors were examined who drew out the plans, though it was contended that the description of the boundaries, as contained in the articles of roup, could not be affected by those plans and such proof. Held, that the old boundary, as contained in the title-deeds and these plans, was the march between the parties.—Glassel v. Earl of Wemyss, 22d March 1806, p. 104.

—(2.) Vide Trust.

—(3.) Circumstances in which a party, residing in Jamaica, was held liable for goods bought by his cor-

respondent in this country to be sent to Jamaica, between whom, it appeared from the correspondence, there was a joint adventure.—*Wilkie v. Johnstone, Bannatyne and Co.* 19th Feb. 1808, p. 191.

SALE.—(4.) *Vide Stopping in Transitu.*

— (5.) *Vide Contract of Sale.*

— (6.) Circumstances in which the plea of compensation was sustained against action brought for the price of spirits.—*Haig v. Hannay*, 17th May 1813, p. 703.

— (7.) In the sale of goods, objections were stated to them when delivered as of inferior quality. This was submitted to arbiters, and the arbiters found in favour of the sellers. The buyers then brought a reduction of the decree arbitral. The Court of Session repelled the reasons of reduction, sustained the defences, and decerned. Affirmed in the House of Lords.—*Sharp, &c. v. Bury, &c.* 17th May 1813, p. 704.

SEQUESTRATION, Recall of.—Circumstances in which a sequestration of landed estates, as to which there was a competition, was recalled.—*M'Adam v. Walker*, 24th March 1813, p. 673.

SEPTENNIAL Prescription.—*Vide Relief*, (2)

SERVICE (General).—In a reduction and declarator of the titles to the Culzean estate, held, (1.), That Earl David's general service (1776) *tanquam legitimus et propinquior hæres et lineæ* of his only brother german, Earl Thomas, necessarily established in him the character of heir of provision under a previous settlement, 1748, and vested in him the personal right to the subjects thereby conveyed to him. The Court, by two previous interlocutors, had found to the contrary; and, in the House of Lords, this part of the judgment was remitted to be reviewed; and *quoad ultra* affirmed as to the subjects contained in the charter 1774.—*Blane, &c. v. Earl of Cassillis and Others*, 24th May, 1805, p. 1.

— (2.) General.—In the above

case, the question was, Whether a general service could establish in Earl David the character of heir of provision to his brother, so as to connect him with the deed 1748? The Court of Session, under the remit from the House of Lords to reconsider the question, altered their former judgment as to the effect of this service of 1776, and found that it was not a service as heir of provision to connect Earl David with the deed 1748, or any similar deed; and, therefore, that the lands specially mentioned in the interlocutor were not carried by that service. But, (2). In regard to the *other* lands specially mentioned in the interlocutor, the Court found that no remit having been made as to them, they adhered to their former interlocutor on that part of the case. The first point being in favour of the appellant, no appeal was brought as to it, but he brought an appeal on the second point, contending that these lands fell under the remit. Held, that it was not the intention of the House, by their remit, to authorise the Court of Session to review their interlocutors in regard to those lands; and therefore appeal dismissed.—*Blane, &c. v. Earl of Cassillis*, 9th May 1810, p. 307. N.B.—The recent act, 10 and 11 Vict. c. 47, regarding services, provides that persons who claim to be served heir of provision in general, or in special, must mention distinctly the deed under which they so claim.

SERVICE (General).—(3.)—*Vide Propinquity and Succession.*

— (4.) Circumstances in which a service set aside.—*Whyte v. Stewart*, 28th Feb. 1806, p. 60.

— (5.) Special.—*Vide Prescription*, (5.)

SERVITUDE. (1.) A servitude of road was claimed, where there was no writing or title to constitute the servitude, but was claimed solely on the ground of immemorial use and possession. Held, on the evidence produced, that though the possession and use were proved for a pe-

riod of forty years, yet, as it was also proved, that for a period of twenty or thirty years that possession had been interrupted, by ploughing the lands over which the servitude of road was claimed, the same was to be held as having been abandoned and derelinquished, and the possession therefore being not continuous but interrupted, the same was not effectual to constitute the servitude claimed.—*Hill v. Ramsay*, 30th March 1810, p. 299.

SERVITUDE.—(2.) Where a right of exclusive property was claimed on the one side, and a servitude of common or pasturage, and casting feal and divot, was claimed, in virtue of immemorial possession, on the other, the proof allowed seemed contradictory, yet the Court decided, from the prescriptive real evidence arising from the *natural* marches on hill grounds, that the respondents had made out their right, and were entitled to interdict and to damages for molestation.—*Whitson v. Sir James Ramsay, &c.*, 14th April 1813, p. 664.

— (3.) In an action brought of immunity from two servitude roads claimed through the pursuer's (appellant's) property, the defender (respondent) was ordered to give in a condescendence of what he claimed as the servitudes, and by virtue of what right or title he was prepared to maintain right to them. The condescendence when given in was objected to, as not stating the nature or origin of the servitudes, or the purposes to which the roads were to be put, and he proposed to establish these servitudes by prescriptive possession of other parties different from the respondent and his authors and predecessors. Held the condescendence relevant to go to proof. Reversed in the House of Lords, and case remitted to give in a new condescendence.—*Earl of Morton v. Stewart*, 21st June 1813, p. 720.

SINE QUA NON.—Vide Trust.

STAMP.—It was objected to a banker's deposit receipt that it wanted a

stamp. This objection was repelled by the Court of Session. In the House of Lords, Held it unnecessary to decide this point in the case.—*Bank of Scotland v. Watson*, 20th March 1813, p. 655.

STIPEND. (1.)—The minister of Pres-tonkirk had, in 1793, obtained an augmentation of stipend. In 1806, he applied for a second augmentation, which was opposed, on the ground that his stipend having been once augmented, the Court of Teinds had no farther power to grant a second augmentation to the minister. Held him entitled to the augmentation, and that the Court had power to grant him such. Affirmed in the House of Lords, with a variation.—*Earl of Wemyss v. Rev. D. Macqueen*, 20th May 1808, p. 210.

— (2.) Same question tried with similar result.—*Duke of Hamilton v. Rev. J. Scott*, 30th May 1808, p. 224.

— (3.) Vide Trust Uses.

— Vide Teinds et Subvaluation of Teinds.

STOPPING in Transitu.—Thirty-two puncheons of rum belonging to the respondents, were lodged and bonded in the King's warehouses, kept by Messrs. Sandeman. While in this situation, the respondents sold the rum by auction, Mathie becoming the purchaser, giving bill for the price at four months, and receiving a delivery order from the sellers, which was duly intimated to the warehousemen, and the sale marked by them in their books, with the name of Mathie as the purchaser. Mathie thereafter sold eighteen puncheons, which were delivered, and the duties paid. But fourteen puncheons still remained in the King's cellar when he became bankrupt, with the bill for the price still unpaid to the respondents. In an action brought by them to recover the fourteen puncheons as still undelivered, and *in transitu*, Held them entitled to stop *in transitu*. Reversed in the House of Lords, and held that the fourteen puncheons were to be considered as

being completely in possession of Mathie at the time of his bankruptcy, as in a question between vendors and vendee.—*Spence v. Auchie, Ure, and Co.*, 16th March 1810, p. 291.

SUBMISSION.—(1.) In a question on a policy of insurance for payment of sum in the policy, the underwriters refused to pay, on the ground of concealment of circumstances. The matter was referred to arbitration, but the appellants did not abide by the arbiter's decision; and, in an action brought in the Admiralty Court, the Judge-Admiral found them barred *personali exceptione*, from founding on the circumstance of alleged concealment; and found the underwriters liable. On action of reduction of Judge-Admiral's decree, the Court adhered. In the House of Lords this judgment was affirmed, without regard to the appellant's being barred *personali exceptione* from founding on the concealment.—*Smith v. Allan*, 21st June 1808, p. 229.

—(2.) Goods having been objected to by the buyer on delivery, as of inferior quality, the dispute was referred to arbiters, who pronounced decree in favour of the seller. A reduction having been brought of the decree-arbitral, the Court of Session repelled the reasons of reduction, and sustained the defence stated, that no decree-arbitral is reducible except on the ground of corruption, bribery, or falsehood in terms of the act 1695, sec. 25.—*Sharpe, &c. v. Burys and Others*, 17th May 1813, p. 704.

SUBVALUATION.—*Vide Teinds.*

SUCCESSION.—Circumstances in which it was held that the appellant had failed to establish his claim to succeed, as heir of his deceased cousin, his propinquity appearing to be through his mother, though he alleged, but failed to prove, that it was traced up through her, until it met in descent from one common ancestor in the male line. In the House of Lords, remitted for recon-

sideration, with special directions.—*Richan v. Trail and Others*, 1st July 1808, p. 239.

SUSPENSION of Decree in foro contradictorio of the Court of Session.—Held, that a suspension of a charge on such a decree, could only be obtained on consignment or caution, and execution sisted upon condition of the defender finding caution *de judicio sisti* during the dependence of the action.—*Allan v. De Voz, &c.*, 24th March 1806, p. 110.

TEINDS.—An action of approbation of the report of the sub-commissioners of subvaluation of teinds of the lands of Ardnacross, belonging to the respondent, taken in 1629, was brought, in order to have the same approved of, with the view of showing that the teinds of these lands, prior to the minister's last (second) augmentation, were exhausted. The minister objected on various grounds. Held, that the respondent was entitled to decree of approbation, and that the objection stated that the minister was not cited to appear, was sufficiently disposed of by the fact, that as he was stipendiary, it was sufficient that the titular appeared to have been made a party to the subvaluation.—*Rev. John Smith, &c. v. Macneil*, 20th Feb. 1809, p. 244.

TRUST USES.—A fund had been raised and mortified, and vested in trust for behoof of the minister of the town of Borrowstownness. At the time the annual produce of the stock did not amount to the minimum stipend of 800 merks, but power was obtained by act of Parliament to assess the inhabitants in order to make up this to 800 merks. Afterwards the value of the stock increased, so as to leave a large surplus over, after paying the minister the 800 merks, and other repairs of the church, &c. The inhabitants sought to appropriate this surplus to other purposes, and pleaded that they had been in the immemorial usage of doing so with the fund.

Held, that they could not do this, and that the surplus belonged to the minister, reversing the judgment of the Court of Session.—Rev. Mr. Rennie, minister of Borrowstounness v. Tod and Others, Inhabitants of Borrowstounness, 21st July 1806, p. 144.

TRUST.—(1.) Estates having been sold belonging to a trust estate. In the trust deed the truster had conveyed these estates to certain trustees named, including his Countess as one, “or such of them as should accept,” providing that a majority should be a *quorum*, and that the Countess should be “one of the *quorum*, and *sine qua non*.” Four out of nine trustees only accepted, and the Countess was one who did not accept. The purchaser objected to the disposition granted by these trustees; alleging that, as the *sine qua non* had not accepted, the trust was gone: Held the disposition as thus granted good and unexceptionable, it being granted by all those who had accepted, and the Countess and her son having signed the disposition as consenters.—Forbes v. Sir William Honyman, Bart., and Others, 31st May 1808, p. 226.

—(2.) Circumstances in which a trust was allowed to be proved by facts and circumstances, and the correspondence of the parties, in regard to a lease granted to the trustee *ex facie* absolute. Affirmed in the House of Lords.—Gordon v. Touch, 13th Feb. 1810, p. 286.

—(3.) Latent.—A partner of a mercantile company had a share in a joint stock concern, which he purchased in his own name, and which appeared recorded in the books in his individual name. He assigned this stock in security of a loan obtained by him, which assignment was duly intimated. After the dissolution of the mercantile company

the representatives and company creditors claimed this as a part of the company property, alleging that the stock only appeared in the individual name of David Stewart, in trust for David Stewart and Company, the joint stock company not permitting partnerships to hold shares: Held that no latent trust or right in equity can defeat an intimated assignment, reversing the judgment of the Court of Session.—Redfearn v. Sommervail, &c., 1st June 1813, p. 707.

TRUSTEE and Commissioners.—(1.) Removal of.—Vide Bankruptcy.

—(2.) Their liability in damages for mismanaging the estate.—Vide Bankruptcy.

USAGE, Immemorial.—Vide Trust Uses.

—Vide Custom.

USE and Possession (Prescriptive).—Vide Servitude.

WARRANTICE of Lease of Fishings.—Vide Retention of Rent (2.)

WITNESS, Instrumentary.—Held (1.) that the instrumentary witnesses were competent witnesses for the pursuer, in an action of reduction, reserving all objections to their credibility. (2.) That the deed fell to be sustained as regularly executed, although one of the witnesses *ex intervallo* deposed, that he did not see the granter subscribe, or hear him acknowledge his subscription. (3.) That neither the act, nor the practice under the act, required that the witnesses should adhibit their subscriptions in the same room with, and in the presence of the granter.—Frank v. Franks, 10th June 1809, p. 278.

—(2.) A witness' evidence was objected to on the ground of interest. Objection sustained.—Same case as above.







